No. 01-1491-CFX Title: Charles Demore, District Director, San Francisco District of Immigration and Naturalization Service, et al., Petitioners
v.
Hyung Joon Kim

Docketed:
April 12, 2002

Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Apr 9 2002	Petition for writ of certiorari filed. (Response due May 31, 2002)
	Apr 23 2002	Order extending time to file response to petition until May 31, 2002.
	May 31 2002	Brief of respondent Hyung Joon Kim in opposition filed.
	May 31 2002	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Jun 11 2002	Reply brief of petitioners Demore, District Director, et al. filed.
	Jun 11 2002	DISTRIBUTED for Conference of June 27, 2002
	Jun 20 2002	Letter and attachment received from the Solicitor General and distributed. VIDED.
	Jun 26 2002	Letter of respondents filed. VIDED.
	Jun 28 2002	Petition GRANTED. SET FOR ARGUMENT January 15, 2003. **********
	Jul 22 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including August 28, 2002.
	Aug 28 2002	Order further extending time to file brief of petitioner on the merits until August 29, 2002.
	Aug 28 2002	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Aug 29 2002	Joint appendix filed.
	Aug 29 2002	Brief of petitioners Charles Demore, District Director, of INS, et al. filed.
	Sep 23 2002	Order extending time to file respondent's brief on the merits to and including October 28, 2002.
	Oct 28 2002	Brief of respondent Hyung Joon Kim filed.
	Oct 28 2002	Brief amici curiae of National Asian Pacific American Legal Consortium, et al. filed.
	Oct 28 2002	Brief amicus curiae of American Bar Association filed.
	Oct 28 2002	Brief amici curiae of Law Faculty, Susan Akram, et al. filed.
	Oct 28 2002	Brief amici curiae of T. Alexander Aleinikoff, et al. filed.
	Oct 28 2002	Brief amici curiae of Citizens and Immigrants for Equal Justice, et al. filed.
	Oct 28 2002	Brief amicus curiae of International Human Rights Organizations filed.
	Oct 30 2002	LODGING consisting of twenty bound copies of related material received from counsel for amici Citizens and Immigrants, et al.
	Nov 21 2002	CIRCULATED.
	Nov 27 2002	Reply brief of petitioners Charles DeMore, District

No. 01-1491-CFX

Entry	Date	Proceedings and Orders
		Director, INS filed.
	Dec 5 2002	Record filed.
	Jan 15 2003	ARGUED.
	Jan 21 2003	Letter from the Solicitor General received and distributed.

Supreme Court, U.S.
FILED

011491 APR - 9 2002

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, ET AL., PETITIONERS

v.

HYUNG JOON KIM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
AUSTIN C. SCHLICK
Assistant to the Solicitor General
DAVID J. KLINE
DONALD E. KEENER
MARK C. WALTERS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 1226(c)(1) of Title 8 of the United States Code requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed a specified offense, including an aggravated felony. Section 1226(c)(2) of Title 8 prohibits release of those aliens during administrative proceedings to remove them from the United States, except in very limited circumstances not present here. The question presented in this case is:

Whether respondent's mandatory detention under Section 1226(c) violates the Due Process Clause of the Fifth Amendment, where respondent was convicted of an aggravated felony after his admission into the United States.

PARTIES TO THE PROCEEDING

In addition to the District Director of the San Francisco District of the Immigration and Naturalization Service, the Attorney General of the United States was named as a respondent in the underlying habeas corpus proceeding in this case and is a petitioner in this Court. See note 2, *infra*.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	3
Reasons for granting the petition	10
Conclusion	20
Appendix A	1a
Appendix B	31a

TABLE OF AUTHORITIES

Cases:

Carlson v. *Landon*, 342 U.S. 524 (1952)	18
Fiallo v. *Bell*, 430 U.S. 787 (1977)	16
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952)	18
Hoang v. *Comfort*, No. 01-1136, 2002 WL 339348 (10th Cir. Mar. 5, 2002)	11, 12
INS v. *St. Cyr*, 121 S. Ct. 2271 (2001)	8-9
Johnson v. *Eisentrager*, 339 U.S. 763 (1950)	19
Kim v. *Ziglar*, 276 F.3d 523 (9th Cir. 2002)	1
Landon v. *Plasencia*, 459 U.S. 21 (1982)	19
Ma v. *Ashcroft*, 257 F.3d 1095 (9th Cir. 2001)	7
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	7
Parra v. *Perryman*, 172 F.3d 954 (7th Cir. 1999)	10, 11, 16
Patel v. *Zemski*, 275 F.3d 299 (3d Cir. 2001)	12
Plyler v. *Doe*, 457 U.S. 202 (1982)	16
Radoncic v. *Zemski*, 28 Fed. Appx. 113 (3d Cir. 2001), petition for cert. pending No. 01-1459	10, 20
Reno v. *Flores*, 507 U.S. 292 (1993)	18
Schlanger v. *Seamans*, 410 U.S. 487 (1971)	6
Shaughnessy v. *Mezei*, 345 U.S. 206 (1953)	16
United States v. *Salerno*, 481 U.S. 739 (1987)	6
Vasquez v. *Reno*, 233 F.3d 688 (1st Cir. 2000), cert. denied, 122 S. Ct. 43 (2001)	6

Cases—Continued: Page

Wong Wing v. *United States*, 163 U.S. 228 (1896) 18
Zadvydas v. *Davis*, 121 S. Ct. 2491 (2001) 5, 7, 8, 13

Constitution and statutes:

U.S. Const. Amend. V 2, 6
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 3
§ 304(a), 110 Stat. 3009-587 to 3009-593.5 5
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 3
§ 101(a)(43), 8 U.S.C. 1101(a)(43) 4, 17
§ 101(a)(43)(G), 8 U.S.C. 1101(a)(43)(G) 5
§ 201, 8 U.S.C. 1151 8
§ 212(a)(2), 8 U.S.C. 1182(a)(2) 2
§ 212(a)(3)(B), 8 U.S.C. 1182(a)(3)(B) 3
§ 212(c), 8 U.S.C. 1182(c) 8, 9
§ 236(c), 8 U.S.C. 1226(c) ..... *passim*
§ 236(c)(1), 8 U.S.C. 1226(c)(1) 4
§ 236(c)(2), 8 U.S.C. 1226(c)(2) 4, 5
§ 236(e), 8 U.S.C. 1226(e) (1994) 14
§ 237(a)(2), 8 U.S.C. 1227(a)(2) 4
§ 237(a)(2)(A)(i), 8 U.S.C. 1227(a)(2)(A)(i) 2
§ 237(a)(2)(A)(ii), 8 U.S.C. 1227(a)(2)(A)(ii) 2
§ 237(a)(2)(A)(iii), 8 U.S.C. 1227(a)(2)(A)(iii) 2, 5
§ 237(a)(2)(B), 8 U.S.C. 1227(a)(2)(B) 2
§ 237(a)(2)(C), 8 U.S.C. 1227(a)(2)(C) 2
§ 237(a)(2)(D), 8 U.S.C. 1227(a)(2)(D) 2
§ 237(a)(4)(B), 8 U.S.C. 1227(a)(4)(B) 3
§ 239, 8 U.S.C. 1229 5
§ 240, 8 U.S.C. 1229a 5
§ 241(a), 8 U.S.C. 1231(a) 5, 8, 13
§ 241(a)(6), 8 U.S.C. 1231(a)(6) 10
§ 242, 8 U.S.C. 1252(a)(2) (1994) 14
§ 243(g), 8 U.S.C. 1253(g) (1994) 14

Statutes—Continued: Page

18 U.S.C. 3521 3
28 U.S.C. 2241 6
Cal. Penal Code (West 1999):
§ 484 5
§ 666 5

Miscellaneous:

H.R. Rep. No. 22, 104th Cong., 1st Sess. (1995) 14, 18
H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. I (1996) 4, 15
Office of the Inspector General, U.S. Dep't of Justice, *Inspection Report, Immigration and Naturalization Service Deportation of Aliens After Final Orders Have Been Issued*, Rep. No. I-96-03 (Mar. 1996) <http://www.usdoj.gov/oig/i9603/i9603.htm> 9, 16
S. Rep. No. 48, 104th Cong., 1st Sess. (1995) 14
S. Rep. No. 249, 104th Cong., 2d Sess. (1996) 4

In the Supreme Court of the United States

No.

CHARLES DEMORE, DISTRICT DIRECTOR,
ET AL., PETITIONERS

v.

HYUNG JOON KIM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the District Director of the San Francisco District of the Immigration and Naturalization Service (INS) and the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 276 F.3d 523. The memorandum order of the district court (App., *infra*, 31a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. Section 1226(c) of Title 8 of the United States Code provides:

> **Detention of criminal aliens**
>
> **(1) Custody**
>
> The Attorney General shall take into custody any alien who—
>
> **(A)** is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> **(B)** is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> **(C)** is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [*sic*] to a term of imprisonment of at least 1 year, or

> **(D)** is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> **(2) Release**
>
> The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. 1226(c).

STATEMENT

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to streamline procedures for removing certain criminal aliens

from the United States. As the House Report on IIRIRA explained, Congress concluded that "our immigration laws should enable the prompt admission of those who are entitled to be admitted, the prompt exclusion or removal of those who are not so entitled, and the clear distinction between these categories." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. I, at 111 (1996). Congress further determined that "[a]liens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others, potential legal immigrants whose presence would be more consistent with the judgment of the elected government of this country about what is in the national interest." S. Rep. No. 249, 104th Cong., 2d Sess. 7 (1996).

The provision of IIRIRA that is at issue in this case is Section 236(c) of the INA, 8 U.S.C. 1226(c). Section 1226(c)(1) requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed specified crimes. In the case of deportable aliens, Section 1226(c)(1) applies when the alien has been convicted of an aggravated felony (as defined in 8 U.S.C. 1101(a)(43)); two or more crimes involving moral turpitude or a crime of moral turpitude that resulted in a sentence of at least one year's imprisonment; a controlled-substance offense, other than simple possession of 30 grams or less of marijuana; a firearms offense; certain crimes such as espionage, sabotage, treason, and threatening the President; and certain immigration offenses. See 8 U.S.C. 1226(c)(1), 1227(a)(2). Section 1226(c)(2) prohibits release of those aliens during the pendency of administrative proceedings instituted to remove them from the United States, except in very

limited circumstances involving witness protection. 8 U.S.C. 1226(c)(2).

Detention under Section 1226(c) lasts only for the duration of the criminal alien's administrative removal proceedings.[1] Detention of an alien following entry of a final order of removal is governed by Section 241(a) of the INA, 8 U.S.C. 1231(a), which this Court interpreted in *Zadvydas* v. *Davis*, 121 S. Ct. 2491 (2001).

2. Respondent is a native and citizen of the Republic of Korea (South Korea). He entered the United States legally in 1984 and became a lawful permanent resident of the United States in 1986, when he was eight years old. App., *infra*, 2a, 32a. On July 8, 1996, when he was 18 years old, respondent was convicted in California state court of first degree burglary. In 1997, he was convicted of "petty theft with priors," in violation of California Penal Code Sections 666 and 484, and received a sentence of three years' imprisonment. See *id.* at 2a, 32a.

In December 1998, while respondent was serving his three-year sentence, the INS charged him with being deportable because of his 1997 conviction for an aggravated felony. App., *infra*, 32a; see 8 U.S.C. 1101(a)(43)(G), 1227(a)(2)(A)(iii). Respondent was released from state prison on February 1, 1999. On February 2, 1999, the INS took respondent into custody under Section 1226(c) and commenced removal proceedings against him. App., *infra*, 2a, 32a. In light of the mandatory nature of Section 1226(c), the INS's San

---

[1] In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-593.5, Congress instituted a new form of proceeding—known as "removal"—that applies to aliens who have entered the United States but are deportable, as well as to aliens who are excludable at the border. See 8 U.S.C. 1229, 1229a.

Francisco District office declined to release respondent on bond. See *id.* at 33a; C.A. E.R. 3.

3. On May 17, 1999, respondent filed a habeas corpus petition under 28 U.S.C. 2241 in the United States District Court for the Northern District of California. App., *infra*, 31a, 33a. Respondent asserted in his petition that Section 1226(c) is unconstitutional on its face because mandatory detention of criminal aliens, without an individualized bond hearing, violates substantive and procedural due process guaranteed by the Fifth Amendment. *Id.* at 33a. Respondent did not dispute that he is deportable as an aggravated felon. See C.A. E.R. 1.[2]

On August 11, 1999, the district court declared Section 1226(c) facially unconstitutional and ordered an individualized bond hearing to determine whether respondent presented a flight risk or a danger to the community. App., *infra*, 31a-51a. Using the analytic framework of *United States* v. *Salerno*, 481 U.S. 739, 747 (1987), the district court reasoned that Section 1226(c) violates due process because "lawful resident aliens possess substantive due process rights during deportation proceedings," App., *infra*, 39a, and "[l]ess

[2] Respondent brought his habeas corpus action against the District Director of the San Francisco District of the INS and the Attorney General of the United States. The District Director was the custodian of respondent Kim and present in the Northern District of California, and therefore was the proper respondent to the habeas corpus petition filed by Kim under 28 U.S.C. 2241 in that district. The Attorney General, who unlike the District Director was not Kim's immediate custodian and was not present in the Northern District of California, was not a proper respondent to the habeas petition. See *Schlanger* v. *Seamans*, 401 U.S. 487 (1971); *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000), cert. denied, 122 S. Ct. 43 (2001).

excessive means exist for accomplishing Congress's goals [in enacting Section 1226(c)], such as having individualized bail hearings," *id.* at 45a. Although the district court thus focused specifically on the due process rights of lawful permanent resident aliens, the court's holding was that Section 1226(c) "is unconstitutional on its face." *Id.* at 48a. In the alternative, the district court held that, under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), Section 1226(c) denies criminal aliens procedural due process. App., *infra*, 48a-50a. After the district court's decision, the District Director of the INS released respondent on $5000 bond. *Id.* at 2a. Respondent then requested a continuance of his administrative removal proceedings, and the request was granted.[3]

4. The court of appeals affirmed on the ground that Section 1226(c) violates substantive due process when applied to respondent, as a permanent resident alien. The court, however, specifically did not affirm the district court's facial invalidation of Section 1226(c). App., *infra*, 5a-6a.[4]

The court of appeals first emphasized respondent's status as a lawful permanent resident, noting that this

[3] The removal hearing initially was rescheduled for March 2002, see App., *infra*, 2a, but was continued again at respondent's request after respondent obtained new counsel.

[4] The court of appeals emphasized, in particular, that it was not addressing whether Section 1226(c) is constitutional as applied to excludable aliens who have been detained at the border. See App., *infra*, 5a-6a. In *Ma* v. *Ashcroft*, 257 F.3d 1095, 1107-1110 (2001), the Ninth Circuit held on remand from this Court that detention of excludable aliens who are subject to a final order of removal, but who cannot be removed from the United States, does not violate due process. See *Zadvydas* v. *Davis*, 121 S. Ct. 2491, 2500-2501 (2001).

"most favored" (App., *infra*, 7a) immigration status entitles an alien to live permanently in the United States, to work, and to apply for citizenship, and most often is granted because of the alien's close family ties to this country. See generally 8 U.S.C. 1151. The court concluded that, because of their statutory rights and what are often strong ties in the United States, lawful permanent resident aliens have a liberty interest in freedom from detention during removal proceedings, which the Constitution protects. App., *infra*, 7a-8a.

Relying on *Zadvydas* v. *Davis*, 121 S. Ct. 2491 (2001) —in which this Court interpreted 8 U.S.C. 1231(a), governing detention following entry of a final removal order, in light of constitutional concerns—the court of appeals next held that detention of lawful permanent residents under Section 1226(c) is permissible only if the government establishes a "special justification" that outweighs the lawful permanent resident's liberty interest. App., *infra*, 11a (quoting *Zadvydas*, 121 S. Ct. at 2499).[5] The court recognized the government's interest in ensuring criminal aliens' availability for removal from the country. The court held, however, that ensuring removal does not justify mandatory detention because of the possibility that removal proceedings might not result in a final order of removal—such as when the alien is granted withholding of removal based on a likelihood of persecution in his native country or relief under former INA Section 212(c) (see *INS* v. *St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271

[5] The court of appeals also expressed the view (App., *infra*, 23a-26a) that its decision was consistent with the analysis of Justice Kennedy's dissenting opinion in *Zadvydas*, 121 S. Ct. at 2507-2517.

(2001)),[6] or when the crime on which the alien's removal was sought is later held not to be an aggravated felony. App., *infra*, 13a-15a.

The court also rejected the government's reliance on a 1996 Justice Department study that showed that 89% of non-detained aliens subject to a final removal order avoided removal. The court believed that the study counted aliens who had been released on bail as "detained," and that such aliens were, according to the study, likely to be removed successfully. See App., *infra*, 15a-16a (discussing Office of the Inspector General, U.S. Dep't of Justice, *Inspection Report, Immigration and Naturalization Service, Deportation of Aliens After Final Orders Have Been Issued*, Rep. No. I-96-03 (Mar. 1996) (*Deportation Report*)<http://www.usdoj.gov/oig/i9603/i9603.htm>).

Turning to the government's interest in protecting the public against additional crimes by removable criminal aliens, the court of appeals concluded that the class of aggravated felonies that trigger mandatory detention under Section 1226(c) includes crimes that are not "egregious" or inherently indicative of a public threat and, therefore, that commission of an aggravated felony is not sufficiently probative of dangerousness to establish a need for detention in all cases. App., *infra*, 16a-21a.

The court of appeals cited (App., *infra*, 21a) congressional testimony by a former Commissioner of the INS for the proposition that the government itself "appear[ed] to have some doubt about" the necessity of

[6] Respondent was convicted of his felony theft offense in April 1997 (see App., *infra*, 32a), after Congress made aggravated felons ineligible for relief from deportation under Section 212(c) of the INA. See *St. Cyr*, 121 S. Ct. at 2276-2277, 2293.

mandatory detention under Section 1226(c). The court also concluded that the necessity of mandatory detention of criminal aliens during removal proceedings is called into question by 8 U.S.C. 1231(a)(6), which gives the Attorney General discretion whether to release criminal aliens who are under a final order of removal, if those aliens have not been removed during the 90-day removal period. App., *infra*, 22a-23a.

The court of appeals disagreed with the Seventh Circuit's decision in *Parra* v. *Perryman*, 172 F.3d 954 (1999), which upheld Section 1226(c) against a due process challenge by a lawful permanent resident alien who conceded that he was removable. In the Ninth Circuit's view, the Seventh Circuit did not give sufficient weight to the liberty interest of lawful permanent resident aliens who are not yet subject to a final order of removal. The court also concluded that the Seventh Circuit had erred by relying on the 1996 Justice Department study that the court here found not to be probative. App., *infra*, 26a-27a; see p. 9, *supra*.

Finding that Section 1226(c) could not satisfy substantive due process as applied to respondent under any plausible narrowing construction (see App., *infra*, 27a-29a), the court of appeals held that a lawful permanent resident alien in removal proceedings must be afforded "a bail hearing with reasonable promptness to determine whether the alien is a flight risk or a danger to the community." *Id.* at 30a.

REASONS FOR GRANTING THE PETITION

On April 4, 2002, the Solicitor General filed a petition for a writ of certiorari (No. 01-1459) to review the judgment of the Third Circuit in *Radoncic* v. *Zemski*, 28 Fed. Appx. 113 (2002) (No. 01-1074), which involves a due process challenge to mandatory detention under

8 U.S.C. 1226(c) by an alien who entered the United States without inspection and has at all times been unlawfully present in the United States. This case, by contrast, involves a challenge by a permanent resident alien. For the reasons stated below and in the certiorari petition in *Radoncic*, review is warranted in both cases to ensure a prompt and definitive resolution of a constitutional issue on which the circuit courts have disagreed. The question of the constitutionality of Section 1226(c) also deserves prompt and definitive resolution because that statutory provision applies to thousands of criminal aliens currently in custody and to hundreds of additional criminal aliens each week, as new removal proceedings are commenced.

1. Review by this Court is warranted to resolve confusion and disagreement among the courts of appeals about the constitutionality of an Act of Congress. The petition in *Radoncic* explains (at 13-15) that four circuits have addressed the constitutionality of mandatory detention of criminal aliens during removal proceedings, and reached inconsistent conclusions. The Seventh Circuit has rejected a due process challenge to Section 1226(c). *Parra* v. *Perryman*, 172 F.3d 954 (1999). In *Parra*, the alien (who, like respondent, was a lawful permanent resident) conceded that he was removable from the United States because of a criminal conviction, and the Seventh Circuit held that because the alien's "legal right to remain in the United States ha[d] come to an end," he had no protected liberty interest in remaining at large in this country that could outweigh the government's interest in detention to ensure removal. *Id.* at 958. The Ninth and Tenth Circuits, by contrast, have held Section 1226(c) unconstitutional as applied to lawful permanent resident aliens, but the law's constitutionality as applied to other

groups of criminal aliens in those circuits is uncertain. See App., *infra*, 5a ("We are not prepared to hold * * * that detention under the statute would be unconstitutional in all of its possible applications."); *Hoang* v. *Comfort*, No. 01-1136, 2002 WL 339348, at *11 (10th Cir. Mar. 5, 2002) (holding Section 1226(c) unconstitutional "as applied to the petitioners as lawful permanent resident aliens"). In the Third Circuit, Section 1226(c) has been held unconstitutional as applied to a lawful permanent resident alien (in *Patel* v. *Zemski*, 275 F.3d 299 (2001)) and an illegal alien (in *Radoncic*).

The Third, Ninth, and Tenth Circuits have expressly rejected the Seventh Circuit's reasoning in *Parra*. See *Patel*, 275 F.3d at 313-314; App., *infra*, 26a-27a; *Hoang*, 2002 WL 339348, at *6. Review is warranted to resolve this circuit conflict about the constitutionality of Section 1226(c).

Resolution of the constitutional issue by this Court is all the more warranted because the enforceability of Section 1226(c) has great practical importance for the administration of the immigration laws. Since IIRIRA's enactment in 1996, the INS has detained more than 75,000 criminal aliens pursuant to the requirements of Section 1226(c). Each week, moreover, there are hundreds of new INS detentions under Section 1226(c) as new removal proceedings against criminal aliens trigger mandatory detention. Because of the broadly recurring nature of the due process challenges to Section 1226(c), both the Executive Branch and the Judicial Branch have a strong interest in resolving this issue as soon as possible.

2. The decision of the court of appeals in this case is incorrect. The court of appeals substituted its own judgment for Congress's determinations regarding the importance of detaining criminal aliens during removal

proceedings. Those aliens have been convicted of particular crimes that Congress specifically enumerated, and they have enjoyed full due process protections in connection with those convictions. Thus, criminal aliens have *already* been accorded the opportunity for an individualized hearing on the essential predicate for their detention under Section 1226(c).

a. The court of appeals relied heavily on *Zadvydas* v. *Davis*, 121 S. Ct. 2491 (2001). App., *infra*, 9a-12a; see *id.* at 23a ("It is sufficient for our purposes to rely on the reasoning of the majority in *Zadvydas*."). *Zadvydas*, however, does not suggest that Section 1226(c) is constitutionally infirm. In *Zadvydas*, the critical fact—which the Court found to raise a sufficient constitutional doubt to warrant an implied temporal limitation on the detention of lawful permanent resident aliens who were subject to a final order of removal —was that the INA otherwise would have authorized "indefinite, perhaps permanent, detention." 121 S. Ct. at 2503; see, *e.g.*, *id.* at 2498 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."). The Court removed the constitutional doubt that it had identified by construing 8 U.S.C. 1231(a) as authorizing detention of such aliens only as long as removal is reasonably foreseeable. *Id.* at 2503. In Section 1226(c), consistent with the holding of *Zadvydas*, Congress itself specified an "obvious termination point" (*ibid.*) for detention, because the provision applies only during the alien's administrative removal proceedings. Detention of an alien who is under a final order of removal is instead governed by 8 U.S.C. 1231(a), the provision this Court interpreted in *Zadvydas*. Because Congress itself established a reasonable and defined limitation on mandatory detention under Section 1226(c), the central constitutional con-

cern underlying the holding of *Zadvydas* has no application here.[7]

b. The court of appeals also reasoned (App., *infra*, 13a-23a) that an individualized hearing to assess a criminal alien's flight risk and danger to the community would not compromise accomplishment of Congress's objectives in enacting Section 1226(c). That reasoning is incorrect.

Section 1226(c) was enacted in direct response to the failure of earlier immigration provisions that provided for the sort of individualized hearings that the court of appeals required here. See 8 U.S.C. 1252(a)(2) (1994) (mandating detention of aggravated felons except upon demonstration by alien of lawful entry and no threat to community or flight risk); 8 U.S.C. 1226(e), 1253(g) (1994) (mandating detention of aggravated felons who sought admission to United States except when alien's home country refused to repatriate and alien demonstrated absence of threat to community). The Senate Governmental Affairs Committee, for example, found that criminal aliens "often fail[ed] to appear for their actual deportation" and that in New York during fiscal year 1993, 88% of all aliens who were ordered to surrender for deportation absconded. S. Rep. No. 48, 104th Cong., 1st Sess. 24 (1995); see also *id.* at 23 (as of 1992, nearly 11,000 aliens convicted of aggravated felonies had failed to appear for their deportation hearings). The House Judiciary Committee similarly

[7] For the same reason, the court of appeals was incorrect when it suggested (App., *infra*, 22a-23a) that the fact that Congress gave the Attorney General discretion to hold bail hearings for aliens who cannot be removed from the United States within the 90-day removal period—and whose removability therefore may be in serious doubt—undermines the constitutionality of mandatory detention during the pendency of removal proceedings.

determined that "[t]he government's attempts to deport those aliens committing the most serious crimes has proved to be ineffective." H.R. Rep. No. 22, 104th Cong., 1st Sess. 6 (1995). That committee further found that "an important subset of the annual growth in the number of illegal aliens—as many as 50,000 or more—consists of those who have been ordered deported, but are not actually removed"; that criminal aliens released on bond had "disappear[ed] into the general population of illegal aliens"; and that "[a] chief reason why many deportable aliens are not removed from the United States is the inability of the INS to detain such aliens through out the course of their deportation proceedings." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 119, 123 (1996).

The court of appeals observed (App., *infra*, 13a-15a) that Section 1226(c) requires detention of some criminal aliens who, although believed by the INS to be removable, might ultimately obtain relief from removal. The Court did not conclude, however, that respondent is likely to obtain such relief. And, in any event, the *possibility* of remaining lawfully in the United States does not eliminate a criminal alien's incentive to flee proceedings that most often lead to a final order of removal. As the data compiled by Congress show, thousands and thousands of aliens previously failed to appear for their removal proceedings, notwithstanding theoretical statutory opportunities for avoiding removal. The very purpose of removal proceedings, moreover, is to identify those aliens who have a statutory right to remain in the country or who qualify for discretionary relief from removal. It would be difficult and administratively cumbersome to identify such persons in advance of full removal proceedings.

Congress, having compiled a factual record demonstrating the high flight risk of criminal aliens and other removable aliens, determined that removal of aggravated felons and other specified criminal aliens could not reliably be accomplished without mandatory detention. That judgment, which directly implicates the "fundamental" sovereign power to expel and exclude aliens, deserves judicial deference. See *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953)); see *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982) ("Congress has developed a complex scheme governing admission to our Nation and status within our borders. * * * The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field.").

The court of appeals erroneously dismissed, as unsupportive of Congress's determination, the conclusion of the Justice Department's *Detention Report* that "[d]etention is key to effective deportation." App., *infra*, 16a (quoting *Detention Report*). In that report, the Department's Office of the Inspector General calculated, based on a sample of 1058 cases in fiscal year 1994, that only 11% of nondetained aliens with final orders of deportation were successfully removed, whereas the INS was able to remove almost 94% of the detained aliens who were ordered deported. *Detention Report* 1, 4, 6.[8] The court of appeals found it "obvious" that aliens released on bond were counted as "detained" aliens in the report, and did not contribute to the 89% "skip rate." App., *infra*, 15a-16a & n.1. The notion that the Inspector General would count aliens who were

[8] In *Parra*, the Seventh Circuit relied on the same Justice Department study. See 172 F.3d at 956 (citing *Federal Register* reference to *Detention Report*).

released from custody on bond as "detained" is, to say the least, not "obvious." And in fact, contrary to the court of appeals' belief, the report confirms (in a portion not cited by the court of appeals) that aliens released on bond rather than held in detention were counted in the category of "nondetained" aliens, who had an overall 11% removal rate. See *Detention Report* 8 ("[INS] staff cited *detained aliens and aliens released on bond* as their priority cases. *Other nondetained alien cases* were worked as time allowed.") (emphasis added). The court relied, as support for its linguistically unlikely reading, on the report's statement that two detained aliens who were released on bond absconded. App., *infra*, 16a n.1. We have been informed by the Office of the Inspector General, however, that—consistent with the language in its report—it in fact counted aliens who were released on bond while awaiting removal within the "nondetained" category. The two aliens cited by the court of appeals were held in INS detention upon the entry of a final order of deportation and were only later released on bond. The court of appeals therefore erred in disregarding the *Detention Report*'s compelling illustration of the problem that Congress sought to address through Section 1226(c).

c. The court of appeals also questioned Congress's selection of the particular crimes that trigger mandatory detention, expressing the view that some of the crimes covered as aggravated felonies (see 8 U.S.C. 1101(a)(43)) do not indicate an "especially serious danger to the public" and that, in any event, a criminal conviction "can be unreliable evidence of dangerousness." App., *infra*, 20a. The court of appeals appears to have concluded categorically that only an alien's conviction of a violent crime that endangers "physical safety" could support detention. *Id.* at 4a.

Again, the Ninth Circuit straightforwardly substituted its own policy judgment for the considered conclusion of the political Branches. When considering immigration reforms, the 104th Congress carefully assessed the list of crimes that triggered removal and mandatory detention of criminal aliens. See, *e.g.*, H.R. Rep. No. 22, *supra*, at 7-8. Whereas the court of appeals was of the view that crimes such as trafficking in stolen vehicles, counterfeiting, and obstructing justice do not pose a particular threat to the public, Congress identified them as crimes "often committed by persons involved in organized immigration crime," which presents a particular concern because it victimizes vulnerable immigrants and leads to involuntary servitude, prostitution, and other illegal activities, and even death. *Id.* at 7.

d. The court of appeals' rejection of Congress's legislative determinations concerning the risk of flight and danger to the community cannot be reconciled with this Court's recognition of Congress's special authority over immigration. See, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Nor is it consistent with this Court's reasoning when the Court has rejected due process challenges to detention under other provisions of the immigration laws. See, *e.g.*, *Reno* v. *Flores*, 507 U.S. 292, 305-306 (1993) (upholding INS regulation limiting release of juvenile alien detainees); *Carlson* v. *Landon*, 342 U.S. 524, 537-542 (1952) (upholding detention of permanent resident aliens based on evidence of Communist Party membership); *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel [aliens] would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.").

3. As explained in the petition in *Radoncic* (at 19-22), review is warranted in both *Radoncic* and this case, to better ensure a definitive resolution of the constitutionality of Section 1226(c). Granting certiorari in this case (which involves a lawful permanent resident) as well as in *Radoncic* (which involves an illegal alien unlawfully present in the United States, who is entitled to lesser due process protection in this context[9]) will enable the Court to address the constitutionality of Section 1226(c) in a wider range of applications and thereby reduce the likelihood of future disagreements in the lower courts about the constitutionality of applying Section 1226(c) to particular classes of aliens.

Granting review in two cases, rather than just one, also is appropriate in light of the unusual potential for mootness in habeas corpus challenges to Section 1226(c). See *Radoncic* Pet. at 20-21. This case is not moot, because respondent's administrative removal proceeding is pending. It also appears unlikely that respondent's removal proceedings—which were continued at respondent's request, see p. 7, & n.3, *supra*—will be completed before the Court renders a decision if it grants review.

The Court therefore should grant the certiorari petition in this case as well as the pending petition in *Radoncic* (No. 01-1459), and the two cases either should be set for oral argument in tandem with one another or should be consolidated for oral argument.

---

[9] See *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."); *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.").

CONCLUSION

The petition for a writ of certiorari should be granted, and the case should be set for oral argument in tandem with, or be consolidated for oral argument with, *Elwood* v. *Radoncic*, petition for cert. pending, No. 01-1459 (filed Apr. 4, 2002).

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
AUSTIN C. SCHLICK
Assistant to the Solicitor General
DAVID J. KLINE
DONALD E. KEENER
MARK C. WALTERS
Attorneys

APRIL 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-17373

HYUNG JOON KIM, PETITIONER-APPELLEE

v.

JAMES W. ZIGLAR, COMMISSIONER;
JOHN ASHCROFT,* ATTORNEY GENERAL,
RESPONDENTS-APPELLANTS

Appeal from the United States District Court for the Northern District of California; Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted Feb. 12, 2001
Filed Jan. 9, 2002

Before: HUG, NOONAN, and W. FLETCHER, Circuit Judges.

WILLIAM A. FLETCHER, Circuit Judge:

We consider a constitutional challenge to § 236(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(c), which requires that the Attorney General take into custody, and detain without bail, certain categories of aliens during the pendency of removal proceedings against them.

* James W. Ziglar, Commissioner, is substituted for his predecessor, Thomas Schiltgen, and John Ashcroft, Attorney General, is substituted for his predecessor, Janet Reno, Fed. R. App. P. 43(c)(2).

Petitioner Hyung Joon Kim, a citizen of Korea, came to the United States in 1984 at the age of six. Two years later, at the age of eight, he became a lawful permanent resident alien. In July 1996, at the age of 18, he was convicted of first degree burglary in California state court. In August 1997, he was convicted in California state court of petty theft with priors, and was sentenced to three years imprisonment. The day after his release from state custody, the Immigration and Naturalization Service ("INS") detained Kim pursuant to 8 U.S.C. § 1226(c)(1)(B), on the ground that his second conviction qualified as an "aggravated felony" under 8 U.S.C. § 1101(a)(43), which in turn made him removable under 8 U.S.C. § 1227(a)(2)(A)(iii).

On May 17, 1999, after more than three months in INS custody, Kim filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, arguing that the no-bail provision of § 1226(c) violates the Due Process Clause of the Fifth Amendment. On August 10, 1999, after Kim had been in custody for six months, the district court held § 1226(c) unconstitutional on its face and ordered the INS to hold a bail hearing to determine Kim's risk of flight and dangerousness. In lieu of holding a bail hearing, the INS released Kim on a $5,000 bond. A hearing before an Immigration Judge ("IJ") to determine Kim's removability is scheduled for March 2002. The INS appeals from the judgment of the district court.

Although Kim is no longer in custody, the case continues to present a live controversy because the INS states that it will take Kim into custody and hold him without bail if we reverse. The district court had jurisdiction pursuant to 28 U.S.C. § 2241. *See INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 2278, 150 L.Ed.2d 347 (2001). We have jurisdiction under 28 U.S.C. § 1291.

We do not hold in this case that the unavailability of bail under § 1226(c) is unconstitutional on its face. We do hold, however, that it is unconstitutional as applied to lawful permanent resident aliens.

I

The INS detained Kim pursuant to 8 U.S.C. § 1226(c), a provision passed as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009. The Section as a whole is entitled "Detention of criminal aliens." Section 1226(c)(1) provides, in relevant part,

> The Attorney General shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in Section 1182(a)(2) of this title,
>
> (B) *is deportable by reason of having committed any offense covered in Section 1227(a)(2)(A)(ii), (A)(iii),* (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(Emphasis added.)

Three things are notable about § 1226(c)(1). First, no bail is allowed during the pendency of removal proceedings. This is true even for aliens who are not flight risks and do not pose any threat to the public. Second, a wide range of past conduct triggers removal proceedings and detention without bail. Much of that conduct is non-violent and poses little threat to the physical safety of the public. *See* discussion in Part V.B, *infra*. Third, the no-bail provision of § 1226(c)(1) contrasts with the availability of bail under § 1231(a)(6). Section 1226(c)(1) prohibits bail for aliens during the pendency of their removal proceedings—that is, during the period before determination of removability and before entry of any removal order. By contrast, § 1231(a)(6) allows bail for aliens against whom a final removal order has been entered, once 90 days have elapsed since the entry of the order. *See* discussion in Part VI, *infra*.

Only one category of alien is exempt from the no-bail requirement of § 1226(c). Section 1226(c)(2) provides for release of government witnesses or those assisting government investigations. Kim has not served as a government witness or assisted in any government investigation, and is therefore not entitled to release from detention under this provision.

II

The district court sustained a facial constitutional challenge to § 1226(c). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987). We recently reaffirmed the vitality of the *Salerno* standard outside of First Amendment cases. *See S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) ("While we have held that [*Planned Parenthood v.*] *Casey* [505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992)] overruled *Salerno* in the context of facial challenges to abortion statutes, we will not reject *Salerno* in other contexts until a majority of the Supreme Court clearly directs us to do so.") (citation and quotation marks omitted).

We do not affirm the district court's facial invalidation of § 1226(c). We are not prepared to hold, on the record in this case, that detention under the statute would be unconstitutional in all of its possible applications. For example, the statute also applies to aliens who have not "entered" the United States. In *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc), we wrote that "[b]ecause excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows." *Id.* at 1450. The Supreme Court noted the importance of the distinction between aliens who have "entered" and those who have not in *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 2500,

150 L.Ed.2d 653 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."). Further, the status of an alien who has been paroled into the United States pursuant to 8 U.S.C. § 1182(d)(5) is the same as that of an alien detained at the border, such an alien has not "entered" the United States. *See* 8 U.S.C. § 1182(d)(5)(A) ("such parole of such alien shall not be regarded as an admission of the alien"); *Leng May Ma v. Barber*, 357 U.S. 185, 188-90, 78 S. Ct. 1072, 2 L.Ed.2d 1246 (1958); *Alvarez-Mendez v. Stock*, 941 F.2d 956, 961 n.4 (9th Cir.1991) ("[A]n excludable alien may be paroled into the United States, in which case the law treats him as if he never entered the country and 'exclusion' remains the procedure for removing him."). The detention of aliens who have not "entered" the United States is not before us, and we are not prepared to address, on the record compiled in this case, whether such detention is unconstitutional.

We therefore stop short of affirming the district court's holding that § 1226(c) is facially unconstitutional. However, "we may affirm on any basis supported by the record." *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 387 (9th Cir. 1994). In the present appeal, there is evidence in the record sufficient to permit us to consider this case as an as-applied challenge. We affirm the district court's grant of habeas corpus relief to petitioner Kim on the ground that the statute is unconstitutional as applied to him in his status as a lawful permanent resident alien who has entered the United States.

III

Lawful permanent resident aliens are the most favored category of aliens admitted to the United States. They have the most ties to the United States of any category of aliens. About seventy percent of lawful permanent resident aliens are admitted because of family members already in the United States. These family members are either United States citizens or, less commonly, other lawful permanent resident aliens. *See* 8 U.S.C. § 1153(a). The next largest group of lawful permanent resident aliens are highly educated or exceptionally skilled professionals who can contribute in important ways to the educational institutions and economy of the United States. *See* 8 U.S.C. § 1153(b).

Unlike almost all other aliens, lawful permanent resident aliens have the right to apply for United States citizenship. They also have the right, without limitation, to work in the United States. Of particular relevance to this case, lawful permanent resident aliens have the right to reside permanently in the United States. They retain that right until a final administrative order of removal is entered. *See* 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1.1(p).

An administrative order of removal cannot be entered against Kim until, at the earliest, an IJ finds that he is removable. That order will not be final until the Board of Immigration Appeals ("BIA") affirms it, or until the period for seeking BIA review has expired. *See* 8 U.S.C. § 1101(a)(47)(B). Until there is a final removal order, Kim's right to remain in the United States is a matter of law, not grace. *See* 8 C.F.R. § 1.1(p) ("The term *lawfully admitted for permanent residence*

means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion or deportation.") (emphasis in original); *see also Foroughi v. INS*, 60 F.3d 570, 575 (9th Cir. 1995).

A lawful permanent resident alien has an obvious and important personal interest in his or her own liberty during the pendency of removal proceedings. This interest is important even if the alien is held, at the end of the proceedings, to be removable. A lawful permanent resident alien usually has family members (in most cases, American citizens) who are in the United States and will remain here after the alien is removed. The alien is facing the prospect of long-term separation, and if the no-bail provision is valid he or she will be unable to see his or her son, daughter, husband, wife, father, or mother except in detention facilities during the pendency of the removal proceedings. Such facilities are sometimes at great distances from where the alien lived and where the family members live. Further, many lawful permanent resident aliens own property and/or businesses. Not allowing the alien to wind up his or her affairs in an orderly and advantageous way will work to the disadvantage not only of the alien, but of all those (including American citizens) who depend on the property or business for their economic well-being.

IV

The government argues that the statute is constitutional, even as applied, because decisions about aliens fall within Congress' plenary powers. We do not question the general power that Congress exercises over immigration matters. "Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S. Ct. 1473, 52 L.Ed.2d 50 (1977) (quoting *Shaughnessy v. U.S. Ex Rel. Mezei*, 345 U.S. 206, 210, 73 S. Ct. 625, 97 L.Ed. 956 (1953)). Indeed, "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Id.* (quotation marks omitted). Hence aliens are not entitled to the same protections as citizens. "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 79-80, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976). Further, it has long been recognized that Congress has a general power to detain aliens pursuant to seeking their removal from the United States. *See Wong Wing v. United States*, 163 U.S. 228, 235, 16 S. Ct. 977, 41 L.Ed. 140 (1896) ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid.").

The question before us, however, is more specific. It is whether Congress has adopted a constitutionally permissible means of detention and removal of lawful permanent resident aliens. On this question we take

guidance from *Zadvydas*, in which the Supreme Court last Term addressed detention of aliens under 8 U.S.C. § 1231(a)(6). That section authorizes the Attorney General to detain certain categories of aliens who have been found removable, after the expiration of the 90-day removal period. In *Zadvydas*, aliens who had been found removable were being detained indefinitely under the statute because no country would accept them. They challenged their detention under the Due Process Clause, the same clause upon which Kim relies.

The government made the same plenary powers argument in *Zadvydas* that it makes to us, but the Supreme Court rejected it. The Court did not "deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions." 121 S. Ct. at 2501. But the Court confined the argument by indicating that Congress' power with respect to aliens "is subject to important constitutional limitations." *Id.* The Court drew support from its earlier decision in *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983), which emphasized that Congress must choose "a constitutionally permissible means of implementing" its plenary power over aliens, and that Congress can exercise that power only if it "does not offend some other constitutional restriction." *Id.* at 941, 103 S. Ct. 2764 (quotation marks omitted).

Zadvydas reaffirmed the principle that aliens are entitled to protection under the Due Process Clause. The Court stated that "the Due Process Clause applies to all 'persons' within the United States, including aliens." 121 S. Ct. at 2500. Even for aliens, "[f]reedom

from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Id.* at 2498. The Court noted that it has upheld civil, or "non-punitive," detention only in those limited circumstances where the government has provided a "special justification" outweighing the individual's liberty interest:

> [G]overnment detention violates [the Due Process] Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, *in certain special and narrow non-punitive circumstances*, where a *special justification*, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint.

Id. at 2498-99 (quotation marks, alterations, and citations omitted; emphasis altered from original).

The Court in *Zadvydas* concluded that the statute before it was non-punitive and regulatory rather than criminal, and analyzed the detention provision to determine whether the government had provided a "special justification" that would justify detention. The government argued that detention was necessary to prevent removable aliens from fleeing and to prevent danger to the community. *Id.* at 2499. The *Zadvydas* Court rejected the government's arguments, concluding that "[t]here is no sufficiently strong special justification here for indefinite civil detention." *Id.* To avoid the constitutional problems that would have been posed by the indefinite detention of removable aliens, the Court held that detention under § 1231(a)(6) is subject to a "reasonable time" limitation. *Id.* at 2495.

See also Ma v. Ashcroft, 257 F.3d 1095 (9th Cir. 2001) (reinstated opinion following remand) ("*Ma II*").

V

In this case, as in *Zadvydas*, it is clear that the statute authorizing detention is civil and regulatory, not criminal or punitive. The detention authorized by § 1226(c) is ostensibly designed to ensure that aliens are removed, and it is established law that removal proceedings are civil. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S. Ct. 3479, 82 L.Ed.2d 778 (1984). Following *Zadvydas*, we thus must analyze § 1226(c) to determine whether the government has provided a sufficiently strong "special justification" to justify civil detention of a lawful permanent resident alien.

The government advances five justifications for no-bail civil detention under § 1226(c): (1) preventing criminal aliens from absconding so that they can be expeditiously removed as required by law, (2) protecting public safety from the presence of potentially dangerous criminal aliens, (3) making the removal of criminal aliens a top priority of immigration enforcement, (4) correcting the failure of the prior laws which permitted release on bond, and (5) repairing damage to America's immigration system.

The last three justifications are so general that they amount to little more than saying that the "justification" of the statute is to make deportation a priority and to make things better. The two principal justifications are those listed first: (1) preventing criminal aliens from fleeing during removal proceedings; and (2) protecting the public from potentially dangerous aliens. It was these two justifications that the Supreme Court

considered—and found insufficient—in *Zadvydas*. We treat them in order.

A. Risk of flight

The government argues that it must detain aliens such as Kim to prevent them from fleeing pending the completion of their removal proceedings. The government contends that under IIRIRA, unlike under the prior statute, removal is virtually certain once removal proceedings have begun. Therefore, argues the government, an alien in removal proceedings has little hope of avoiding removal and correspondingly little incentive to appear for his removal hearing. *See also Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) ("Before the IIRIRA[,] bail was available . . . as a corollary to the possibility of discretionary relief from deportation; now that this possibility is so remote, so too is any reason for release pending removal."). The government thus contends that without no-bail detention, it will be unable to ensure that removable aliens will actually be removed.

We are not persuaded. First, IIRIRA did not eliminate all avenues of relief for persons subject to § 1226(c). An alien convicted of an aggravated felony may be eligible for withholding of removal if (1) removal to a particular country might threaten the alien's life or freedom because of the alien's race, religion, nationality, membership in a particular social group, or political opinion, and (2) the alien has not participated in persecution, has not committed a particularly serious crime, and does not pose a danger to the United States. *See* 8 U.S.C. § 1231(b)(3)(A), (B). An alien may also receive relief under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment. *See Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001).

Second, the Supreme Court's recent decision in *St. Cyr*, rendered since the government's briefs were filed, upheld habeas corpus relief for aliens subject to removal because of a prior conviction for an aggravated felony conviction. 121 S. Ct. at 2293. The Court held that discretionary relief under former INA § 212(c) was preserved for a large category of aliens removable because of an aggravated felony. The Court held that "§ 212(c) relief remains available for aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *Id.* The preservation of § 212(c) relief is particularly important in providing a defense to removal. The Court noted that 90% of convictions are through guilty pleas, *see id.* at 2292 n. 51, and that in the past more than 50% of the applications for § 212(c) relief were granted. *Id.* at 2277 n. 5. The Court observed, further, that because IIRIRA expanded the definition of aggravated felony to include "more minor crimes which may have been committed many years ago," it is likely "that an increased percentage of applicants will meet the stated criteria for § 212(c) relief." *Id.* at n. 6.

Third, some aliens detained under the statute may be able to demonstrate that the conviction for which the INS seeks to remove them was not an aggravated felony. At the very least, the broad and somewhat uncertain sweep of the statutory definitions of aggravated felony ensures that there will be many disputes on the margins. We have held, against the contention

of the government, that certain convictions do not qualify as aggravated felony convictions. *See, e.g., Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001) (holding that conviction for laundering $1,300 was not an aggravated felony); *Sareang Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000) (holding that state-law offenses of vehicle burglary did not make alien eligible for removal because they were neither "burglaries" nor "crimes of violence" under the INA).

In addition to relying on increased flight risk allegedly resulting from the passage of IIRIRA, the government relies on a 1997 report, prepared by the Department of Justice Office of the Inspector General. *See* Inspection Report, "Immigration and Naturalization Service Deportation of Aliens After Final Orders Have Been Issued," Rep. No. I-96-03 (March 1996), *available at* http://www.usdoj.gov/oig/i9603/i9603.htm ("Report"). The Report concluded that 89% of "nondetained" aliens subject to a final removal order failed to appear for removal when ordered to do so. *See id.* at 8-9. The government relies on the 89% "skip rate" to argue that no-bail detention under § 1226(c) is necessary to ensure appearance at the removal hearing.

The Report is based on a study of the files of 1,058 randomly selected aliens who were issued final deportation orders. The files were divided into two categories, "detained" and "nondetained" aliens. Of the "detained aliens," 94% were "successfully deported." *Id.* at 6. Most of the remaining 6% were not "successfully deported" for innocent reasons. For example, half were not deported for political or humanitarian reasons. *Id.* Of the "nondetained aliens," 89% fled to avoid deportation. *Id.* at 11-12.

The government makes a fundamental factual error in relying on the 89% figure in the Report. That figure applies to "nondetained aliens." Aliens released on bail were "detained" rather than "nondetained" as those categories are defined in the Report. *Id.* at 6.[1] The 89% figure is thus inapplicable to aliens released on bail.

The Report concluded, "Based on the results of our sample of 1,058 cases, it is clear that most of the aliens actually deported were detained, and few of the nondetained aliens were deported. *Detention is key to effective deportation.*" *Id.* at 14 (emphasis added). When the Report thus recommended "detention" as "key to effective deportation," it recommended precisely what Kim seeks and the government opposes.

B. Danger to the public

We next consider the government's interest in protecting the public from dangerous aliens released

---

[1] In the section entitled "Removal of Detained Aliens," the Report states:

> We reviewed 402 *detained alien case files.* INS deported 376, or almost 94 percent of all the aliens. The 26 aliens not deported included 13 of nationalities that could not be deported for political or humanitarian reasons, 4 for whom INS was unable to obtain travel documents, 2 pending travel arrangements, 2 who had been granted administrative relief, *2 who had been released on bond and then absconded,* 1 with a Federal appeal pending, 1 pending prosecution for illegal entry after a previous deportation, and 1 who had been indicted for murder and turned over to the local police department.

Id. at 6 (emphasis added). Since those "released on bond" were counted among the "detained alien case files," it is obvious that such aliens were categorized as "detained aliens."

pending removal proceedings. Existing Supreme Court precedents establish that civil detention will be upheld only when it is narrowly tailored to people who pose an unusual and well-defined danger to the public. In such cases the government has had the burden of proving that the particular individual meets the criteria for detention.

In *Salerno,* 481 U.S. 739, 747, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987), the Supreme Court upheld the constitutionality of pre-trial detention of people accused of "the most serious of crimes," namely "crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders." 481 U.S. at 747, 107 S. Ct. 2095. But *Salerno* required the government to do more than merely charge a person with a serious crime: "In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.* at 750, 107 S. Ct. 2095.

In *Kansas v. Hendricks,* 521 U.S. 346, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997), the Supreme Court upheld Kansas' "Sexually Violent Predator Act," which permitted civil detention of people with a "mental abnormality" or "personality disorder" that rendered them likely to commit "predatory acts of sexual violence." *Id.* at 352, 117 S. Ct. 2072. Even though the statute's application was confined to "a small segment of particularly dangerous individuals," *id.* at 368, 117 S. Ct. 2072, the Court cautioned that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involun-

tary commitment." *Id.* at 358, 117 S. Ct. 2072. The Kansas statute required an additional finding of mental illness, thus further "limit[ing] involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." *Id.* The combination of the dangerousness finding and the mental illness finding—both of which the government had to prove beyond a reasonable doubt—rendered the detention permissible. *See also Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L.Ed.2d 323 (1979) (requiring the state to prove by clear and convincing evidence that a person is mentally ill and requires hospitalization to protect himself and others before commitment to a mental institution satisfies due process).

In *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L.Ed.2d 437 (1992), the Supreme Court struck down a Louisiana statute under which a defendant found not guilty by reason of insanity was civilly detained until the defendant proved that he or she was not dangerous. The Court observed that "[u]nlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited." *Id.* at 81, 112 S. Ct. 1780. The scheme did not require the government to find that the person to be detained was presently mentally ill. And it did not carefully restrict its application to the most dangerous, in part as a result of the fact that "the statute place[d] the burden on the detainee to prove that he is not dangerous." *Id.* at 82, 112 S. Ct. 1780.

The civil detention schemes upheld by the Supreme Court in *Salerno* and *Hendricks* contrast sharply with pre-adjudication civil detention under § 1226(c). The

critical difference is that § 1226(c) contains no provision for an individualized determination of dangerousness. *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525, 96 L.Ed. 547 (1952), on which the government places great weight, is not to the contrary. In *Carlson*, the petitioners were detained aliens who were members of the Communist party. The detention statute in question, enacted during the Cold War, deemed members of the Communist party a threat to national security because of the Communist party's advocacy of violent revolution. The Court upheld a rebuttable presumption of detention for members of the Communist party. It wrote, "Detention is necessarily a part of th[e] deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings." *Id.* at 538, 117 S. Ct. 2072.

But in *Carlson* there was only a presumption, not a certainty, of detention, and the possibility of discretionary release pending the proceedings was central to the Court's approval of the detention scheme: "Of course purpose to injure could not be imputed generally to all aliens subject to deportation, so discretion was placed by the 1950 Act in the Attorney General. . . ." *Id.* Moreover, the Court noted in *Carlson* that detention without bail was exceptional: "There is no evidence or contention that all persons arrested as deportable . . . for Communist membership are denied bail. In fact, a report filed with this Court . . . at our request shows allowance of bail in the large majority of cases." *Id.* at 541-42, 72 S. Ct. 525. By contrast, under § 1226(c), bail is simply never allowed.

Finally, the government argues that § 1226(c) "relies on actual egregious crimes or conduct of convicted criminals as conclusive evidence that the alien is a 'public menace.'" This argument is insufficient to justify a blanket denial of bail, for "aggravated felonies," as defined in the statute, are not all "egregious"; nor do they "conclusively" establish the people who have committed them are menaces to the public.

Recent decisions of this circuit demonstrate the wide range of crimes that meet the statutory definition of aggravated felony. *See, e.g., United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001) (state felon in possession); *Park v. INS*, 252 F.3d 1018 (9th Cir. 2001) (involuntary manslaughter); *Albillo-Figueroa v. INS*, 221 F.3d 1070 (9th Cir. 2000) (possession of counterfeit obligations). The definition of aggravated felony includes trafficking in vehicles with altered identification numbers, *see* § 1101(a)(43)(R), and obstructing justice, *see* § 1101(a)(43)(S). Many of these provisions include crimes "relating to" those crimes. *See, e.g.*, § 1101(a)(43)(S) (defining aggravated felony as "an offense relating to obstruction of justice").

Given the range of crimes qualifying as aggravated felonies, the government simply cannot show that § 1226(c) covers only aliens who pose an especially serious danger to the public. Moreover, the fact of a prior conviction alone, without any individualized consideration of the dangerousness of the underlying crime or of the individual's present condition, can be unreliable evidence of dangerousness. Not only may the crime itself have failed to indicate dangerousness; the conviction rendering the alien removable may also have

occurred many years ago, and the alien may have led a law-abiding life since that time.

In sum, we believe that here, too, the government has failed to carry its burden. It has failed to demonstrate that the fact that some aliens may be dangerous justifies civil detention, without bail, of all lawful permanent resident aliens who have been charged with removability.

VI

Outside the four corners of this litigation, the government itself appears to have some doubt about whether no-bail civil detention is a desirable—let alone a necessary—means of dealing with aliens subject to removal proceedings. First, the INS has questioned the wisdom and efficacy of § 1226(c), and has brought to Congress' attention the need for alternative means of ensuring that aliens appear for their removal proceedings. In testimony before the Senate Subcommittee on Immigration, then-Commissioner of the INS Doris Meissner stated that "we are actively exploring alternatives to detention for ensuring that aliens for whom release from custody is appropriate appear for their scheduled hearings." Immigration and Naturalization Oversight Hearings on INS Reform: Detention Issues, Before the Subcomm. on Immigration of the Senate Judiciary Comm., Testimony of INS Commissioner Doris Meissner, *available at* 1998 WL 767401 (F.D.C.H.) (Sep. 16, 1998). Commissioner Meissner also questioned the need for mandatory detention:

> Most of the people for whom Custody is mandatory are people we want removed from the United States. However, in some cases, no purpose is

> served by maintaining the person in custody during the entire process. Accordingly, while we agree that we have discretion to determine whether to pursue removal, we firmly believe that determination should not be dictated by whether the person's custody will be mandated by the statute.

Id. We are reluctant to uphold civil detention impinging on fundamental liberty interests, based on a government policy the need for which the implementing agency has itself questioned.

Second, current law allows bail to aliens who have already been ordered removed once 90 days have passed since the entry of the removal order. *See* 8 U.S.C. § 1231(a)(6) ("An alien ordered removed . . . *may* be detained beyond the [90-day] removal period and, *if released*, shall be subject to the terms of supervision in paragraph (3)." (emphasis added)). If aliens subject to a final order of removal may be released on bail, it makes little sense to deny bail to those who are in removal proceedings but have not yet been ordered removed. The incentives to flee are greater for an alien already ordered removed than for an alien still in removal proceedings. Further, an alien ordered removed is likely to be more dangerous on average than an alien in removal proceedings, since the ground for removal (which may be dangerous conduct) will have been found rather than merely alleged. Yet despite the greater likelihood of flight and dangerousness of aliens already ordered removed, § 1231(a)(6) permits their release on bail. The availability of bail for such aliens thus casts substantial doubt on the argument that aliens merely subject to removal proceedings are so

likely to flee and so dangerous that there is a "special justification" warranting their detention without bail.

VII

Following the approach of the *Zadvydas* majority, we thus conclude that the government has not provided a "special justification" for no-bail civil detention sufficient to overcome a lawful permanent resident alien's liberty interest on an individualized determination of flight risk and dangerousness. It is sufficient for our purposes to rely on the reasoning of the majority in *Zadvydas*. But we note that § 1226(c) also cannot pass constitutional muster under the alternative analysis set forth by Justice Kennedy in that case. *See Zadvydas*, 121 S. Ct. at 2507 (Kennedy, J., dissenting).

Justice Kennedy (joined by Chief Justice Rehnquist) disagreed with the *Zadvydas* majority's attempt to avoid a constitutional problem by adopting a limiting construction of the statute. Justice Kennedy argued that the proper constitutional test was whether the detention was arbitrary or capricious. "[B]oth removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." *Id.* at 2515. He argued that "[i]t is neither arbitrary nor capricious to detain the aliens when necessary to avoid the risk of flight or danger to the community," *id.*, but that such detention requires strict procedural safeguards. He wrote:

> Whether a due process right is denied when removable aliens who are flight risks or dangers to the community are detained turns . . . not on the substantive right to be free, but on whether there are adequate procedures to review their cases,

> allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large.

Id.

Justice Kennedy then went through a detailed analysis of the regulations governing post-removal-period detention under § 1231(a)(6). First, he noted that the procedures for finding an alien removable in the first instance require that the government prove its case by clear and convincing evidence, and that the alien be given the right to appeal this decision, to move for reconsideration, or to seek discretionary cancellation of removal. "As a result, aliens . . . do not arrive at their removable status without thorough, substantial procedural safeguards." *Id.* at 2514.

Second, Justice Kennedy pointed to the regulations promulgated under the statute. The majority in *Zadvydas* summarized these provisions:

> [T]he INS District Director will initially review the alien's records to decide whether further detention or release under supervision is warranted after the 90-day removal period expires. 8 C.F.R. § 241.4(c)(1), (h), (k)(1)(i) (2001). If the decision is to detain, then an INS panel will review the matter further, at the expiration of a 3-month period or soon thereafter. § 241.4(k)(2)(ii). And the panel will decide, on the basis of records and a possible personal interview, between still further detention or release under supervision. § 241.4(i). In making this decision, the panel will consider, for example, the alien's disciplinary record, criminal record, mental health reports, evidence of rehabilitation, history of flight, prior immigration history, and favorable factors such as family ties. § 241.4(f). To authorize release, the panel must find that the alien is not likely to be violent, to pose a threat to the community, to flee if released, or to violate the conditions of release § 241.4(e). And the alien must demonstrate "to the satisfaction of the Attorney General" that he will pose no danger or risk of flight. § 241.4(d)(1). If the panel decides against release, it must review the matter again within a year, and can review it earlier if conditions change. §§ 241.4(k)(2)(iii), (v).

Id. at 2495.

Justice Kennedy found these procedures constitutionally sufficient, analogizing them to the procedures involved in parole-eligibility and parole-revocation determinations. *Id.* at 2516. He concluded that "the procedural protection here is real, not illusory," and cited to statistics showing that aliens often succeeded in securing their release. *Id.* Indeed, between February 1999 and mid-November 2000, more than half of the roughly 6,200 aliens who received individualized custody reviews before the end of the 90-day removal period were released. *Id.* (citing 65 Fed. Reg. 80285 (2000)).

The procedures that Justice Kennedy found sufficient to save the statute before the Court in *Zadvydas* from unconstitutionality are entirely absent from § 1226(c). Accordingly, if we were to apply Justice Kennedy's analysis in *Zadvydas* to the facts of this case, we would

conclude that detention under § 1226(c) is arbitrary and capricious and therefore violates due process.

VIII

Two courts of appeals have addressed the constitutionality of no-bail detention under § 1226(c). The Third Circuit has just held, as we do in this case, that detention of a lawful permanent resident alien without an individualized bail hearing is unconstitutional. *See Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001). On the other hand, the Seventh Circuit has upheld the constitutionality of no-bail detention under § 1226(c) for all aliens. *See Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) ("Given the sweeping powers Congress possesses to prescribe the treatment of aliens, the constitutionality of § 1226(c) is ordained.") (citation omitted).

We believe that *Parra* was incorrectly decided. Not only was *Parra* decided prior to *Zadvydas*, in which the Court made clear that the government was required to provide a "special justification" for civil detention of aliens; it was also decided prior to the Court's decision in *St. Cyr*, which preserved § 212(c) discretionary relief and thus made a final removal order less likely for many aliens.

The panel in *Parra* also made two critical mistakes, one legal and one factual. First, *Parra* analyzed the liberty interest of the detained alien based on the erroneous legal assumption that he or she has no right to remain in the United States once removal proceedings have begun. In analyzing an alien's liberty interest in release during removal proceedings, *Parra* stated, "Persons subject to § 1226(c) have forfeited any *legal* entitlement to remain in the United States[.] . . . The

private interest here is . . . liberty *in the United States* by someone no longer entitled to remain in this country. . . ." 172 F.3d at 958 (emphases in original). This is simply wrong. A lawful permanent resident alien such as Kim has a legal right to remain in the United States until a final removal order is entered against him. *See* discussion in Part III, *supra*.

Second, *Parra* relies on the Inspector General's Report for the proposition that there is an 89% "skip rate" for aliens subject to a final removal order. It wrote, "According to the Department [of Justice], approximately 90% of persons in Parra's situation absconded *when released on bail* before the IIRIRA." *Id.* at 956 (emphasis added). This, too, is simply wrong. As discussed above, the skip rate for "detained aliens" was not 89% (which *Parra* rounds up to 90%). Rather, the skip rate for detained aliens was substantially less than 6%. As pointed out above, release on bail was included in the Report's definition of "detention," and the Report recommended "detention" thus defined as the "key to effective deportation." *See* discussion in Part V.A, *supra*.

IX

We must consider whether we can adopt a construction of § 1226(c) that would allow us to avoid the constitutional question presented in this case. "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *St. Cyr*, 121 S. Ct. at 2279 (citation omitted) (quoting *Crowell v. Benson*, 285 U.S. 22, 62, 52 S. Ct. 285, 76 L.Ed. 598 (1932)). *See also Ma II*, 257

F.3d at 1106 ("The Supreme Court has long held that courts should interpret statutes in a manner that avoids deciding substantial constitutional questions."). Kim argues that such a construction is possible, focusing on the "is deportable" language in § 1226(c). Kim urges us to construe "is deportable" to mean that the alien is subject to a final order of removal. A final order is not entered until, at a minimum, an IJ enters a final order finding the alien removable. Under this construction, the Attorney General would be without authority to detain aliens subject to removal proceedings under § 1226(c) because such aliens are not yet subject to final orders of removal.

In construing a statute to avoid constitutional problems, we cannot adopt a "strained construction of the statute," *Ma v. Reno*, 208 F.3d 815, 827 (9th Cir. 2000), *modified and reinstated by Ma II*; nor can we adopt a saving construction that is "plainly contrary to the intent of Congress." *United States v. X-Citement Video*, 513 U.S. 64, 78, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994). "In performing our constitutional narrowing function, we may come up with any interpretation we have reason to believe Congress would not have rejected." *Ma II*, 257 F.3d at 1111 (citation and quotation marks omitted).

Considered in isolation, the "is deportable" language could mean "subject to a final order of removal entered by an IJ." But when considered in the context of the entire statute, such a construction is not available. The rest of the statute makes clear that the alien is subject to no-bail detention—that is, "is deportable"—as soon as he or she is released from custody for the criminal conviction that constitutes the aggravated felony providing the basis for removal. *See* 8 U.S.C. § 1226(c)(1) ("The Attorney General shall take into custody any alien . . . *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.") (emphasis added). We are thus not at liberty to interpret the statute as postponing the application of the no-bail provision until after the completion of the alien's removal proceeding before the IJ.

X

In construing § 1321(a)(6) not to allow indefinite civil detention of aliens, the Supreme Court in *Zadvydas* was careful to state:

> [W]e leave no "unprotected spot in the Nation's armor." Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of national security.

121 S. Ct. at 2502 (citation omitted). After the horrific events of September 11, 2001, the Court's statement takes on special significance.

No one contends that Kim is a terrorist. He was brought to the United States from Korea when he was six years old and became a lawful permanent resident alien when he was eight. He committed rather ordinary crimes in the state of California, and those crimes are the basis for the removal proceedings now pending against him.

No responsible court will leave an "unprotected spot in the Nation's armor," and our decision does not do so. We do not hold that a lawful permanent resident alien in removal proceedings has an absolute right to bail. We hold only that such an alien has a right to an individualized determination of a right to bail, tailored to his or her particular circumstances.

We must remember that our "Nation's armor" includes our Constitution, the central text of our civic faith. It is the foundation of everything that makes our country's system of laws and freedoms worth defending. As a lawful permanent resident, Kim is entitled to the individualized determination and fair procedures guaranteed by the Due Process Clause of the Fifth Amendment.

Conclusion

We affirm the order of the district court requiring the INS to conduct a bail hearing for Kim. However, our rationale does not go as far as the district court's. We do not hold that § 1226(c) is unconstitutional on its face. Rather, we hold only that it is unconstitutional as applied to Kim in his status as a lawful permanent resident alien. We hold that the INS may detain a lawful permanent resident alien prior to removal proceedings, but that due process requires that it hold a bail hearing with reasonable promptness to determine whether the alien is a flight risk or a danger to the community.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 99-2257 SI

HYUNG JOON KIM, PETITIONER

v.

THOMAS SCHILTGEN AND JANET RENO, RESPONDENTS

[Filed: Aug. 11, 1999]

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

On August 6, 1999, the Court heard argument on Hyung Joon Kim's petition for a writ of habeas corpus challenging the constitutionality of the mandatory detention provisions of INA § 236(c). Having carefully considered the arguments of the parties and the papers submitted, the Court GRANTS Kim's petition and orders the government to provide a bail hearing as specified herein. To the extent that Kim seeks immediate release from INS detention during the pendancy of his deportation proceedings, Kim's petition is DENIED.

BACKGROUND

Petitioner Hyung J. Kim ("Kim"), a citizen of Korea, is confined by the federal government pending the conclusion of his removal proceedings. Kim was born in

Seoul, Korea, on December 10, 1977, and entered the United States as a non-immigrant on March 10, 1984 at the age of six. He became a legal permanent resident of the United States on March 26, 1986 at age 8. He is now twenty-one, and has lived in the United States for fifteen years.

On July 8, 1996, at age 18, Kim was convicted in California state court of first degree burglary. On April 23, 1997, at age 19, he was convicted in California state court of petty theft with priors, and on October 8, 1997, he was sentenced to three years in state prison. His estimated release date was February 1, 1999.

On December 16, 1998, the Immigration and Naturalization Service ("INS") issued a notice to appear, placing Kim in removal proceedings under the Immigration and Nationality Act ("INA" or "the Act"). The notice to appear charged Kim with deportability pursuant to § 237(a)(2)(A)(iii) of the INA, as an alien convicted of an aggravated felony as defined in § 101(a) (43) of the Act. 8 U.S.C. § 1227(a)(2)(A)(iii). Under this section, theft offenses for which the sentence is to at least one year imprisonment are defined as aggravated felonies. Kim's conviction for petty theft with priors, for which he received a three-year sentence, thus met the definition of an aggravated felony.

At the same time the notice to appear was issued, the INS determined that Kim would be held without a bond hearing, because the INA prohibited his release from custody. The notice to appear was served on Kim on February 2, 1999, after he had completed his prison sentence, and Kim was accordingly taken into INS custody. Kim remains a legal permanent resident until a final finding of his deportability is made.

Section 236(c)(1) of the INA, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, states that the Attorney General "shall take into custody any alien who" is removable as an aggravated felon under INA § 1227(a)(2)(A)(iii). This section thus mandates the detention of criminal aliens during their removal proceedings. A person taken into custody under § 236(c)(1) may only be released if the person is a participant in the federal witness protection program and can show that he is not a flight risk or a danger to the community. As Kim is not a member of the witness protection program, § 236(c)(1) results in his mandatory detention pending his deportation proceedings. Because under the statute he cannot be released on bail, he has not been granted a bail hearing.

Kim filed this petition for a writ of habeas corpus on May 17, 1999. Kim asserts that by mandating his detention without a bail hearing, § 236(c)(1) violates his constitutional right to due process as guaranteed by the Fifth Amendment to the United States Constitution. Kim seeks a declaration of this Court that § 236(c)(1) of the INA is unconstitutional on its face as violative of procedural and substantive due process rights. Kim also requests an order directing Thomas Schiltgen, District Director of the San Francisco INS, to release Kim from custody.

LEGAL STANDARD

A writ of habeas corpus may be issued when a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3), 2245(a). A request for federal habeas corpus relief must be based on a violation of federal law.

See Moore v. Calderon, 108 F.3d 261, 264 (9th Cir. 1997).

A federal statute is presumed constitutional unless shown otherwise. *Martinez v. Greene*, 28 F. Supp. 1275, 1281 (D. Colo. 1998). To prevail on a facial challenge to the constitutionality of a statute, the petitioner "must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

DISCUSSION

1. Jurisdiction.

The government does not contest this Court's jurisdiction under 28 U.S.C. § 2241 to entertain challenges to the constitutionality of § 236(c). *See* opposition, 5:10-11; *see also, Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999).

2. Statutory history.

Congress addressed the deportability of criminal aliens in § 241 of the Immigration and Nationality Act of 1952. Under the old INA, an alien was subject to deportation if convicted of a "crime involving moral turpitude" and if the crime was committed within five years after entry into the United States. INA § 241(a)(4)(A). An alien convicted of violating drug or firearm laws was also deportable. INA § 241(a)(4) and (11). Release pending deportation was placed within the discretion of the Attorney General. INA § 223.[1]

[1] Section 223 of the INA provided that: "pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion

In 1988, Congress amended the criminal alien provisions of the INA in the Anti-Drug Abuse Act of 1988 (ADAA). The ADAA established a new category of deportable alien, "aggravated felon." Aggravated felonies were defined as murder, drug trafficking crimes, or illicit trafficking in firearms or destructive devices, and any attempt or conspiracy to commit such acts in the United States. INA §101(a). The ADAA required the Attorney General to take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence and barred the Attorney General from releasing the alien. INA § 242(a)(2).

The ADAA's mandatory detention of aggravated felons was immediately challenged as violative of due process, and was declared unconstitutional by the majority of courts which considered it. *See, e.g., Leader v. Blackman*, 744 F. Supp. 500 (S.D.N.Y. 1990); *Kellman v. INS*, 750 F. Supp. 625 (S.D.N.Y. 1990); *Probert v. INS*, 750 F. Supp. 252 (E.D. Mich. 1990), *aff'd on other grounds*, 954 F.2d 1253 (6th Cir. 1992); *Paxton v. INS*, 745 F. Supp. 1261 (E.D. Mich. 1990); *Agunobi v. Thornburgh*, 745 F. Supp. 533 (N.D. Ill. 1990). *But see Davis v. Weiss*, 749 F. Supp. 47 (D. Conn. 1990); *Morrobel v. Thornburgh*, 744 F. Supp. 725 (E.D. Va. 1990). In the wake of these successful constitutional challenges. Congress amended the INA in 1990 and 1991 "to permit release of those aggravated felons who were lawfully admitted to the United States, and who could demonstrate that they were not a threat to the

of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on condition of parole."

community and were likely to appear for their hearings." *Martinez*, 28 F. Supp.2d at 1279-80.

In April 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, Stat. 1214 ("AEDPA"). AEDPA created automatic mandatory detention without eligibility to apply for bond for aggravated felons and other non-citizens with criminal convictions. AEDPA § 440(c), INA § 242(a)(2). Five months after AEDPA, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 1570 ("IIRIRA"). IIRIRA expanded the definition of an "aggravated felony" to include new crimes, *see* INA 101(a)(43), and replaced AEDPA's mandatory detention provision for criminal aliens with the provision at issue in the instant case. INA § 236(c).[2]

---

[2] Section 236(c) governs the custody of criminal aliens pending their removal proceedings:

> (1) *Custody.* The Attorney General shall take into custody any alien who
>
> > (A) is inadmissible by reason of having committed any offense covered in section 212(a)(2);
> >
> > (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D).
> >
> > (C) is deportable under section 237(a)(2)(A)(I) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
> >
> > (D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B), when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> (2) *Release.* The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to Section 3521 of title 18, United States Code, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

Subdivision (1) of § 236(c) requires the mandatory detention of certain criminal aliens during the pendency of their removal proceedings. Subdivision (2) provides a single exception to the mandatory detention provisions of subdivision (1) for participants in the federal witness protection program.[3]

---

[3] Because of its concerns regarding insufficient detention space and INS personnel, the INS requested that the mandatory detention provisions of § 236(c) be held in abeyance for two years. During that time, the Transition Period Custody Rules ("TPCR") provided by IIRIRA § 303(b)(3) controlled the detention of criminal aliens. *See* Commissioner's Letter Invoking Temporary Period Custody Rules for FY 1998, Sept. 26, 1997, Respondents' Explanation Re: TPCR. Under the TPCR, a criminal alien was entitled to a bond hearing before an Immigration Court, at which the alien could show that he or she did not present a substantial risk of flight or threat to the community. The Immigration Court then had the discretion to grant bond for the duration of the alien's deportation proceedings. *See* IIRIRA § 303(b)(3).

3. Violation of due process.

Kim claims that he has been denied due process of law, in violation of the Fifth Amendment, because he has not had, and in fact by statute cannot have, a bail hearing to determine whether he is a suitable candidate for release pending his removal proceedings.[4] Kim argues that this mandatory detention under § 236(c) violates criminal aliens' rights to both substantive and procedural due process.

a. Substantive due process.

A petitioner's right to substantive due process prevents the government from conduct that "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). Violations of substantive due process occur when the government interferes with rights "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

In evaluating whether § 236(c) violates aliens' substantive due process rights, Kim argues this Court should adopt the standard of review delineated in *United States v. Salerno*, 481 U.S. 739 (1987). The *Salerno* standard involves a two step analysis. First, the court determines whether the statute at issue is "impermissible punishment or permissible regulation." *Salerno*, 481 U.S. at 747. If it qualifies as a permissible regulation, the court then examines whether the

[4] From Kim's moving papers, the Court has been unable to determine if Kim is contesting the applicability of § 236(c)(1) to him. However, as Kim argues that § 236(c) is facially unconstitutional, the Court need not examine the particulars of Kim's own case.

statute is an excessive means of achieving the permissible goal. If it is excessive, then the statute violates the petitioners' substantive due process rights. *See id.* Kim argues this standard should govern this Court's examination of § 236(c).

Respondents contend that the *Salerno* test is overly strict and therefore inappropriate. Citing Congress' broad authority over immigration, respondents argue the Court must defer to Congress' judgment, and restrict its examination of §236(c) to the rational review test. Respondents suggest the "(unexacting) standard of rationally advancing some legitimate governmental purpose," a standard applied in *Reno v. Flores*, 507 U.S. 292, 305 (1993).

It is clear that lawful resident aliens possess substantive due process rights during deportation proceedings. *See Landon v. Plasencia*, 459 U.S. 21, 33 (1982) ("Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."); *see also Flores*, 507 U.S. at 306 ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Mathews v. Diaz*, 426 U.S. 67 (1976).

While lawful resident aliens do enjoy substantive due process rights, Congress has the power to limit those rights. Congress' power over immigration is plenary, and it may accordingly promulgate rules for aliens "that would be unacceptable if applied to citizens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). It has been stated that "over no conceivable subject is the legislative power of Congress more complete" than over immigration. *Id.* The effect of this extraordinary breadth of Con-

gressional power is to crutail judicial review of immigration policy. As the Supreme Court has stated, "[o]ur cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments, largely immune from judicial control." *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953).

Despite Congress' plenary authority over immigration, however, there is a distinction between substantive immigration policy and the procedures by which that policy is implemented. While courts must defer to Congress' authority when reviewing substantive immigration policy, there is no such restriction to their review of the rules that implement or enforce that policy. Specifically, Congress' decisions about the admissibility and deportability of aliens must be accorded deference by the courts, but the courts may require Congress to "respect the procedural safeguards of due process" in the *implementation* of those decisions. *Fiallo*, 430 U.S. at 792 n 4. The Supreme Court has recognized this distinction between the level of review appropriate for substantive versus procedural immigration legislation. In *INS v. Chadha*, 462 U.S. 919 (1983), for example, the Court, while reviewing a challenge to the constitutionality of a section of the INA, stated that

> [t]he plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question, but what is challenged here is *whether Congress has chosen a constitutionally permissible means of implementing that power.* As we made clear in *Buckley v. Valeo*: "Congress has plenary authority in all cases in which it has substantive legislative

> jurisdiction, *so long as the exercise of that authority does not offend some other constitutional restriction.*"

Chadha, 462 U.S. at 940-41 (emphasis added) (internal citations omitted). Courts therefore may examine the procedural means by which Congress reaches its substantive immigration ends under a stricter standard than pure deference.

Several courts have recently held that § 236(c) is a procedural statute, rather than one embodying substantive immigration policy. "Indefinite detention of aliens ordered deported is not a matter of immigration policy; it is only a means by which the government implements Congress' directives." *Phan v. Reno*, __ F. Supp. 2d __, 1999 WL 521980 (W. D. Wash. 1999). The court in *Martinez v. Greene*, 20 F. Supp. 2d 1275, 1281 (D. Colo. 1998), in examining a facial challenge to § 236(c) identical to the case at bar, characterized the petitioner's case as "challeng[ing] the method by which the immigration statutes are implemented," rather than implicating Congress' plenary authority over substantive immigration policy.

The Court agrees that § 236(c) is not substantive immigration legislation. The statute does not determine which aliens are deportable and which are not, nor does it confer or deny entitlements. Such determinations and categorical "line-drawing" are the hallmarks of immigration policy legislation. *See Fiallo*, 430 U.S. at 797-98. In contrast, § 236(c) simply delineates the procedure for detaining aliens already determined by Congress to be deportable. As Judge Smith stated in *Danh v. Demore*, __ F. Supp. 2d __, Slip Op. C 99-1531 FMS (N.D. Cal. 1999), "[m]andatory detention with no

possibility of bond is not a simple . . . policy decision that a system of ordered liberty can entrust solely to the political branches of government. It is only ancillary to substantive immigration policy and, as such, does not escape searching judicial review." *Danh*, ___ F. Supp. 2d at ___, Slip Op. at 12:9-14. Since § 236(c) is only "a method by which the immigration statutes are implemented," and accordingly not entitled to deferential review, the Court applies the *Salerno* standard. *Martinez*, 28 F. Supp. 2d at 1281.

Respondents' reliance on the standard used in *Flores* is accordingly inapposite. In *Flores*, juvenile aliens brought a class action suit against the INS for violations of substantive due process. The juvenile aliens were detained under INS regulations preventing their release unless they could show they could be released to the custody of a parent or legal guardian. *Flores*, 507 U.S. at 294-98. In determining which standard of review to apply, the Supreme Court rejected a strict scrutiny standard because a fundamental liberty interest was not at stake. *See id.* at 299-300, 305-306. First, as juveniles, the petitioners were always in some form of custody, and accordingly had no fundamental right to be released into a non-custodial setting. *See id.* at 301-03. Second, the petitioners were not being detained in jail or prison, but in low-security facilities meeting "state licensing requirements for shelter care, foster care . . . and related services to dependent children." *Id.* at 298. Finally, as aliens, the petitioners were subject to Congress' plenary authority over immigration, and accordingly possessed a lesser right to substantive due process.

Flores is distinguishable from the present case. Unlike the juvenile aliens in *Flores*, criminal aliens detained by § 236(c) are adults, with a full interest in being free from custody, and are in fact detained in jail, rather than in surroundings approximating foster care. Nor is Congress' plenary authority over immigration dispositive, since the regulations at issue here reflect not substantive immigration policy, but rather procedural implementation of it.

Respondents also contend that since *Salerno* was a criminal case, and deportation proceedings are classified as civil proceedings, the *Salerno* standard is inapposite. Respondents argue that as criminal defendants are afforded procedural safeguards to which aliens are not entitled, such as the presumption of innocence and the right to a speedy trial, a standard of review that evolved from a criminal case cannot be applicable to aliens. The Court finds this argument unpersuasive. What is at stake is not the presumption of innocence or right to a speedy trial, but the right to be free from bodily restraint. While aliens may not possess rights to the former, they certainly enjoy a right to the latter. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments."); *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 586-87 n.9 (1952) (immigrants stand "on an equal footing with citizens" under the Constitution with respect to protection of personal liberty). As the court stated in *Danh*, "[i]t strains the imagination that individuals detained because of criminal activity should have more rights than those held simply for regulatory purposes." *Danh*, __ F. Supp. 2d at __, Slip Op. at 13:9-11. The

fact that the *Salerno* standard emerged from a criminal case does not obviate its relevance here. Indeed, the *Salerno* test has been used by all courts reviewing the constitutionality of § 236(c) but one. *See Diaz-Zaldierna v. Fasano*, 43 F. Supp. 2d 1114 (S.D. Cal. 1999), *Van Eeton v. Beebe*, __ F. Supp. 2d __ , 1999 WL 312130 (D. Or. 1999), *Martinez*, 28 F. Supp. 2d 1275, *Danh*, _F. Supp. 2d __, Slip Op. C 99-1531 FMS; *but see Parra*, 172 F.3d 954.

In applying the *Salerno* test,[5] a court must first determine whether the infringement on liberty at issue is "impermissible punishment or permissible regulation." *Salerno*, 481 U.S. at 747. The Supreme Court has held that deportation is regulatory, not punitive. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *see also Carlson v. Landon*, 342 U.S. 524, 537 (1952). As for the legitimacy of the regulation, in its enactment of IIRIRA, which amended the INA to include § 236(c), Congress referred to several valid motivations. Congress wished to prevent criminal aliens from absconding during their removal proceedings, as at the time twenty percent of criminal aliens released on bond did not return for deportation. Congress was also motivated by the need to protect the public from potentially dangerous criminal aliens, and to restore public confidence in the immigration system. *See* S. Rep. No. 48, 104th Cong., 1st Sess. (1995) (1995 WL 170285 (Leg. Hist.) at 1-6, 9, 18-23). These are legitimate and per-

[5] At oral argument, the Court inquired of government counsel what the result in this case should be if the *Salerno* test were applied to § 236(c), and counsel responded that petitioner Kim would get his bail hearing. However, since respondent's briefing suggests to the contrary, the Court will analyze the statute in light of *Salerno*.

missible goals, well within Congress' plenary power over immigration policy. Accordingly, § 236(c) passes the first prong of the *Salerno* test as permissible regulation.

The next step is to determine whether the infringement on liberty is "excessive in relation to the regulatory goal Congress sought to achieve." *Salerno*, 481 U.S. at 747. Respondents argue that in light of a twenty percent abscondence rate, mandatory detention for all criminal aliens pending deportation is not excessive. The Court disagrees. To obtain its goals regarding a relatively small minority of criminal aliens, section 236(c) applies to *every* criminal alien an irrebuttable presumption that they pose a flight risk and/or a danger to the community. In *Carlson*, the Supreme Court stated that such blanket presumptions, with no safeguards to protect due process rights, are impermissible. In that case, the Supreme Court affirmed the detention of Communist aliens, but specifically cited the Attorney General's discretion to grant bond as a factor in its decision. The Court stated, "[o]f course purpose to injure *could not be imputed generally to all aliens subject to deportation.*" *Carlson*, 342 U.S. at 538 (emphasis added). Yet this is precisely what § 236(c) does. While the government's goals are valid, § 236(c) simply paints with too broad a brush. That twenty percent of criminal aliens do not return for deportation cannot justify mandatory detention without a bail hearing for the remaining eighty percent. As the *Martinez* court stated, "Due process demands more." *Martinez*, 28 F. Supp. 2d at 1283. Less excessive means exist for accomplishing Congress' goals, such as having individualized bail hearings. Section 236(c) accordingly fails the second prong of the *Salerno* test, as an ex-

cessive infringement of criminal aliens' rights to substantive due process.

Salerno and *Carlson* both support this result. In *Salerno*, the Supreme Court upheld the Bail Reform Act's pretrial detention measures, in part because "[t]he arrestee [was] entitled to a prompt detention hearing" and the Attorney General had discretion to grant bail. *Salerno*, 481 U.S. at 747. In contrast, the Attorney General has no discretion to grant either bail or a bail hearing under § 236(c), as the statute requires mandatory detention. In the absence of that discretion, § 236(c)'s infringement on the aliens' liberty interest becomes excessive. In *Carlson*, the Attorney General had discretion to release Communist aliens on bail pending their deportation, but chose to deny bail. The Supreme Court upheld the Attorney General's decision as falling within his discretion, but pointed out that the *existence* of that discretion was crucial. *Carlson*, 342 U.S. at 538. Again, § 236(c) contains no discretionary provisions. Instead, a purpose to injure is imputed generally to aliens subject to deportation, in direct contradiction to the Supreme Court's admonition in *Carlson*. This blanket presumption is simply excessive in relation to Congress' goals.

Other district courts have granted petitions for writs of habeas corpus based on § 236(c), but have generally restricted their analysis to the constitutionality of § 236(c) as applied to individual petitioners. *See, e.g.*, *Van Eeton*, __F. Supp. 2d __ , 1999 WL 312130, *Danh*, __ F. Supp. 2d __, Slip Op. C 99-1531 FMS, *Phan*, __ F. Supp. 2d __, 1999 WL 521980. The district court in *Diaz-Zaldierna* found that § 236(c) was not unconstitutional as applied to the petitioner, in part because the

petitioner had a hearing scheduled to determine whether
§ 236(c) even applied to his case. *Diaz-Zaldierna*, 43 F. Supp. 2d at 1120. Because these courts conducted as-applied analysis, they did not reach the question now before this Court, whether § 236(c) is facially unconstitutional.

The two courts that have addressed this facial issue have reached different conclusions. *Martinez* held that the mandatory detention strictures of § 236(c) are excessive in light of Congress' goals, and accordingly that they violate substantive due process. *Martinez*, 28 F. Supp. at 1282. In *Parra*, the Seventh Circuit applied a purely deferential standard to its review of § 236(c), and found that it "plainly is within the power of Congress." *Parra*, 172 F.3d at 958. *Parra*'s result, however, is distinguishable. The *Parra* court did not apply the *Salerno* test, as the court deferred to Congress' plenary power over immigration and accordingly did not look beyond the rational review test.[6] As explained above, this Court has determined that § 236(c) is a procedural implementation of immigration policy, and so examination of the statute under the *Salerno* test is appropriate. Under the second prong of that test, § 236(c) is excessive in light of its goals.

---

[6] In addition, the *Parra* court analyzed the constitutionality of § 236(c) in reference to an abscondence rate of 90%. *Parra*, 172 F.3d at 956. The Congressional records, however, indicate a 20% abscondence rate. *See*, S. Rep. No. 48, 104th Cong., 1st Sess. (1995) (1995 WL 170285) (Leg. Hist.) At 1-6, 9, 18-23. Respondents refer to the 20% abscondence rate, as did the court in *Danh*. *See* Respondents' Opposition, 13:19-20; *see also Danh*, __ F. Supp. 2d __ , Slip Op. at 13:26-14:2.

For the reasons stated above, the Court finds that § 236(c) is unconstitutional on its face, having failed the second prong of the *Salerno* test. Mandatory detention of all criminal aliens under § 236(c) is plainly excessive in light of Congress' goals, and therefore violates substantive due process.

b. Procedural due process.

Kim also argues that § 236(c)(1) violates criminal aliens' rights to procedural due process.[7] "[P]rocedural due process requires that [a] restriction [on liberty] be implemented fairly." *Salerno*, 481 U.S. at 746. To determine whether a given procedure, statute, or governmental conduct violates a petitioner's right to due process, courts apply the three-step analysis from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The court must evaluate the private interest that will be affected by the official action; the risk of erroneous deprivation of the private interest, and the effect of any additional safeguards on that risk; and the government's interest in maintaining the current procedures. *See id.*

Despite respondents' contentions to the contrary, resident legal aliens are entitled to procedural due pro-

[7] Once a court finds that a petitioner's substantive due process rights have been violated, it is not strictly necessary to evaluate possible violation of his or her procedural due process rights. "Only when a restriction on liberty survives substantive due process scrutiny does the further question of whether the restriction is implemented in a procedurally fair manner become ripe for consideration." *Danh*, __ F. Supp. at __, Slip Op. at 20:11-14. However, the Court will consider petitioner's procedural due process claim, should it later be determined that § 236(c) does not violate substantive due process.

cess protection under *Mathews*. Respondents argue that "[b]ecause of Congress' plenary power over immigration and its right to detain aliens as part of the removal process, all that procedural due process requires is 'some level of individualized determination' to ensure that the alien's detention pending his removal is not arbitrary." Respondents' Return and Opposition to Petition for Writ of Habeas Corpus, 15:3-6. Respondents' assertion is misplaced, as § 236(c), a procedural implementation of Congress' immigration policy, does not merit this kind of deferential review. The Court also notes that many courts have applied *Mathews* when reviewing both § 236(c) and its predecessor, ADAA 7343(a). *See e.g., Van Eeton*, __ F. Supp. __, 1999 WL 312130; *Martinez*, 28 F. Supp. at 1282; *Leader v. Blackman*, 744 F. Supp. 500, 508 (S.D.N.Y. 1990); *Paxton v. INS*, 745 F. Supp. 1261, 1266 (E.D. Mich. 1990). Respondents' position seems particularly untenable since *Parra*, the case upon which respondents heavily rely for many of their arguments, also applied the *Mathews* test to determine the petitioner's procedural due process rights. Accordingly, the procedural due process rights of aliens under § 236(c) must be evaluated under the *Mathews* test.

The private interest at stake here is "great—the right to be free of indefinite and possible long-term detention pending a deportability determination." *Martinez*, 28 F. Supp. 2d at 1283. The *Danh* court called the private interest "fundamental to any democratic society: the right to freedom from arbitrary detention." *Danh*, __ F. Supp. 2d at __, Slip Op. at 21:25-27. The risk of erroneous deprivation of that interest is substantial, since under § 236(c) no procedures exist to determine whether the given in-

dividual merits release on bond. Additional safeguards are readily available, as for example the bond hearing procedures which were in place during the transitional period under IIRIRA § 303(b)(3). Finally, the burden on the government in changing its procedures is minimal. Since criminal aliens already must come before an Immigration Judge for a determination of whether § 236(c) applies to them, the government could reinstitute bond hearings at that same time. While the government's interest in preventing alien abscondence and protecting the public is strong, it is insufficient to overrule the stronger private interest and high risk of erroneous deprivation of that private interest. Accordingly, the Court finds that § 236(c) violates criminal aliens' rights to procedural due process.

CONCLUSION

For the foregoing reasons, the Court finds and declares that § 236(c) violates criminal aliens' rights to substantive and procedural due process. The mandatory detention provision of § 236(c) fails to provide any meaningful procedure to detained aliens; accordingly, there are no circumstances under which § 236(c) could be valid. It is therefore unconstitutional on its face. Kim's application for a writ of habeas corpus is GRANTED to the extent that respondents shall promptly provide Kim with an individualized bond hearing, pursuant to IIRIRA's Transition Custody Rules, IIRIRA § 303(b)(3), or otherwise as respondents may elect, to determine whether Kim is a flight risk or a danger to the community.

IT IS SO ORDERED.

Dated: August 10, 1999

/s/ SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

Supreme Court, U.S.
FILED
MAY 31 2002
CLERK

No. 01-1491

In The
Supreme Court of the United States

CHARLES DEMORE,
DISTRICT DIRECTOR, ET AL.,

Petitioners,

v.

HYUNG JOON KIM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

LUCAS GUTTENTAG
LILIANA M. GARCES
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Immigrants' Rights Project
405 14th Street, Suite 300
Oakland, California 94612
(510) 625-2010

JUDY RABINOVITZ
(Counsel of Record)
LEE GELERNT
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Immigrants' Rights Project
125 Broad Street
New York, New York 10004
(212) 549-2618

BRIAN CONDON
ARNOLD & PORTER
777 S. Figueroa Street
44th Floor
Los Angeles, California 90017
(213) 243-4123

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT	1
A. Legislative Background of 8 U.S.C. 1226(c)	2
B. Administrative and District Court Proceedings	4
C. The Court of Appeals' Decision	6
REASONS FOR DENYING THE WRIT	10
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES:

Bouayad v. Holmes, 74 F. Supp. 2d 471 (E.D. Pa. 1999) 18

Carlson v. Landon, 342 U.S. 524 (1952) 8, 15, 20

Foucha v. Louisiana, 504 U.S. 71 (1992) 15

Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002) 11, 13

INS v. St. Cyr, 533 U.S. 289 (2001) 7

Kansas v. Crane, 534 U.S. 407 (2002) 20

Kansas v. Hendricks, 521 U.S. 346 (1997) 8, 15, 20

Kiareldeen v. Reno, 71 F. Supp. 2d 402 (D.N.J. 1999) 18

Matter of Ching, 12 I. & N. Dec. 710 (BIA 1968) 28

Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999) 7, 12, 13

Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001) ..... *passim*

Radoncic v. Zemski, 28 Fed. Appx. 113 (3d Cir. 2001) 12, 13, 14

Reno v. Flores, 507 U.S. 292 (1993) 20

U.S. v. Salerno, 481 U.S. 739 (1987) 8, 15, 19, 20

Zadvydas v. Davis, 533 U.S. 678 (2001) ..... *passim*

DOCKETED CASES:

Danesh v. Jenifer, No. 01-1735 (6th Cir.) 27

Elwood v. Radoncic, No. 01-1459 27

Ly v. Hanson, No. 01-3016 (6th Cir.) 27

TABLE OF AUTHORITIES – Continued

Page

Welch v. Ashcroft, No. 00-7665 (4th Cir.) 27

Zgombic v. Farquharson, No. 00-6165 (2d Cir.) 27

STATUTES AND REGULATIONS:

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 2

§ 303(b), 110 Stat. 3009-586 2

§ 303(b)(2), 110 Stat. 3009-586 26

§ 303(b)(3), 110 Stat. 3009-586 ..... 2-3, 22

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:

8 U.S.C. 1226A (2002) 25

8 U.S.C. 1226(c) ..... *passim*

8 U.S.C. 1226(c)(1)(B) 1

8 U.S.C. 1226(c)(1)(C) 1

8 U.S.C. 1226(c)(2) 1

8 U.S.C. 1228(a) 27

8 U.S.C. 1231(a) 28

8 U.S.C. 1231(a)(6) 8, 17

8 U.S.C. 1231(b)(3) 4

8 U.S.C. 1251(a)(1)(B) (1994) 28

8 U.S.C. 1251(a)(1)(E)(i) (1994) 28

8 U.S.C. 1252(a) (1994) 23

TABLE OF AUTHORITIES – Continued

Page

8 U.S.C. 1536 25

8 U.S.C. 1536(a)(2) 25

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 25

8 C.F.R. 3.19(a) 5, 26

8 C.F.R. 3.19(d) 5, 26

8 C.F.R. 3.19(f) 5, 21

8 C.F.R. 3.19(h)(2)(ii) 26

8 C.F.R. 3.19(i)(1) 5, 21

8 C.F.R. 3.19(i)(2) 5, 22

8 C.F.R. 3.38 ..... 5, 21

8 C.F.R. 236.1(c)(8) 5, 21, 26

MISCELLANEOUS:

3d Cir. I.O.P. 5.3 14

3d Cir. I.O.P. 5.8 14

H.R. 1452, 107th Cong. (2001) 4

H.R. Rep. No. 104-469, pt. 1 (1996) 25

Immigration and Naturalization Oversight: Hearings on INS Reform: Detention Issues Before the Senate Subcomm. on Immigration, Comm. on the Judiciary, 1998 WL 767401 (F.D.C.H.), 105th Cong. (1998) (testimony of Doris Meissner, former Comm'r, INS) 3

TABLE OF AUTHORITIES – Continued

Page

Office of the Inspector General, U.S. Dep't of Justice, Inspection Report, Immigration and Naturalization Service Deportation of Aliens After Final Orders Have Been Issued, Rep. No. I-96-03 (Mar. 1996), at http://www.usdoj.gov/oig/i9603/i9603l.htm 23, 24, 25

STATEMENT

This case presents a narrow issue. It does not raise any questions about the government's authority to remove aliens who have been convicted of certain crimes. Nor is it about the government's authority to use detention to effectuate removal – *i.e.*, to detain aliens who might otherwise flee or present a danger to the public. Rather, this case is solely about whether Congress has chosen a constitutionally permissible means for implementing these goals: mandatory detention of a broad group of aliens – many convicted of relatively minor crimes – without any individualized determination that their detention is warranted because they present a danger to the community or a flight risk.

The statute at issue in this case, 8 U.S.C. 1226(c), governs the detention of criminal aliens pending proceedings to determine if they are deportable from the United States. The statute requires the Immigration and Naturalization Service (INS) to take into custody any alien who "is deportable" from the United States based on having been convicted of any of a wide range of crimes. *See* 8 U.S.C. 1226(c)(1)(B) & (C). It then prohibits the INS from releasing any such individual (except under very narrow circumstances involving witness protection), *see* 8 U.S.C. 1226(c)(2), including individuals such as the respondent who are longtime legal permanent residents of the United States and who are eligible for various forms of relief from removal.

Respondent was mandatorily detained for six months under Section 1226(c) before the district court ordered that he was entitled to a bond hearing. He does not challenge INS's authority to take him into custody after he finished

serving his criminal sentence. His challenge is solely to Section 1226(c)'s absolute prohibition on his release from detention, even where, as here, the INS never asserted that he posed a danger or significant flight risk and subsequently agreed to release him on a $5,000 bond. But for the decision below, the government would have no choice but to redetain the respondent throughout the conclusion of his immigration proceedings, a period that could extend for months, or possibly years.

A. Legislative Background of 8 U.S.C. 1226(c).

Both before and after Section 1226(c)'s enactment, the government expressed discomfort with the statute's broad mandatory detention requirement.[1] Largely because of these concerns, INS persuaded Congress to defer implementation of Section 1226(c) for two years, and to replace it with "Transition Period Custody Rules" (TPCR). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 303(b), Pub. L. No. 104-208, 110 Stat. 3009-586.[2] These rules, which were in effect from

[1] Letter from Jon P. Jennings, Acting Assistant Attorney General to the Honorable Albert Gore, Jr., President of the Senate (June 10, 1999) (Ex. E of Petitioner-Appellee's Brief before the court of appeals) (noting that "in some respects [the statute] went too far" and urging Congress to restore the Attorney General's discretion to release certain aliens).

[2] IIRIRA 303(b)(3) provides:

(A) In general. – During the period in which this paragraph is in effect pursuant to paragraph (2), the Attorney General shall take into custody any alien who –

(i) has been convicted of an aggravated felony (as defined under section 101(a)(43) of the Immigration and Nationality Act, as amended by section 321 of this division),

(ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act,

(Continued on following page)

October 1996 until October 1998, permitted the Attorney General to release lawfully admitted criminal aliens who could demonstrate that they were neither a danger nor flight risk. *Id.*

The INS sought an extension of the TPCR based on their success in increasing criminal alien removal as well as INS's continuing concern that Section 1226(c)'s broad detention mandate would undermine INS's enforcement efforts.[3] This effort was unsuccessful and Section 1226(c) took effect in October 1998. Legislation is currently pending in the House Judiciary Committee that would restore the Attorney General's discretion to release from detention

(iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act (before redesignation under this subtitle), or

(iv) is inadmissible under section 212(a)(3)(B) of such Act or deportable under section 241(a)(4)(B) of such Act (before redesignation under this subtitle), when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(B) Release. – The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and –

(i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding, or

(ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not accept the alien, and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

[3] *See* Immigration and Naturalization Oversight: Hearings on INS Reform: Detention Issues Before the Senate Subcomm. on Immigration, Comm. on the Judiciary, 1998 WL 767401 (F.D.C.H.), 105th Cong. (1998) (testimony of Doris Meissner, former Comm'r, INS).

lawful permanent residents such as the respondent, who were convicted of crimes for which they were sentenced to less than five years, and who can demonstrate that they pose neither a danger nor flight risk. *See* H.R. 1452, 107th Cong. (2001). Such legislation would encompass respondent and would moot this case.

B. Administrative and District Court Proceedings

Respondent entered the United States in 1984 at the age of six and has lived virtually his entire life in this country as a lawful permanent resident. Pet. App. 2a. All of his immediate family reside in the United States, including his parents and siblings. C.A. E.R. 7. The INS has charged him with deportability based on his 1997 conviction for "petty theft with priors." Pet. App. 2a.[4]

Upon completion of his criminal sentence in February 1999, the INS ordered respondent's immediate detention, even though he had not been ordered deported by an immigration judge and remains eligible for "withholding of removal" under 8 U.S.C. 1231(b)(3). Respondent requested a bond hearing before an immigration judge to demonstrate that he was neither a danger nor flight risk. INS maintained that he was barred from receiving such a hearing under Section 1226(c). Pet. App. 32a.

In May 1999, respondent filed a writ of habeas corpus in district court. Pet. App. 2a. Respondent argued that Section 1226(c) was unconstitutional since it deprived him

[4] This conviction stemmed from respondent's prior conviction for breaking and entering a tool shed for which he received probation. C.A. E.R. 6-7. Respondent was required to serve only half of the three-year sentence he received. C.A. E.R. 7.

of any opportunity to demonstrate that he was neither a danger nor flight risk. Pet. App. 33a. The district court granted the petition, declared Section 1226(c) unconstitutional, and ordered that respondent be provided with an immediate bond hearing to determine whether he was a flight risk or danger. Pet. App. 50a. At that point, respondent had already been detained by the INS for six months.

The government did not seek a stay of the district court's order that it provide the respondent with a bond hearing. It also did not wait for an immigration judge to conduct such a hearing and decide whether respondent should be released. Instead, the INS determined that respondent should be released on a $5,000 bond based on *its own determination* that he posed neither a danger nor flight risk. Pet. App. 2a.[5] Since his release from INS detention, respondent has appeared for all his scheduled hearings. Respondent's next hearing will consider his application for withholding of removal.

[5] Regulations governing the grant or denial of bond to detained aliens provide that the INS makes the initial determination whether an alien poses a danger or risk of flight and is therefore ineligible for bond, 8 C.F.R. 236.1(c)(8), followed by an immigration judge bond hearing to review that determination. During this hearing the INS can argue to the judge why the alien should not be released on bond. 8 C.F.R. 3.19(a), (d). If the immigration judge grants release, the INS can appeal the decision to the Board of Immigration Appeals (BIA) and seek an emergency stay of the release order pending appeal. 8 C.F.R. 3.19(f), 3.19(i)(1), 3.38. The INS can also invoke an "automatic stay" of the release order, thereby preventing the alien's release until the BIA rules on the INS's bond appeal. 8 C.F.R. 3.19(i)(2). These regulations were recently strengthened to allow the automatic stay to continue if a release order is upheld by the BIA and the INS seeks certification of the order to the Attorney General. *Id.*

C. The Court of Appeals' Decision.

The court of appeals held that Section 1226(c) violates due process as applied to lawful permanent residents such as the respondent, under the due process analysis set forth by this Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001).[6] First, the court of appeals found that a lawful permanent resident "has an obvious and important personal interest in his or her own liberty during the pendency of removal proceedings." Pet. App. 8a. In light of this liberty interest, the court of appeals then applied the due process test enunciated in *Zadvydas* – namely, had the government put forth a "special justification" for Section 1226(c) that outweighed the deprivation of respondent's liberty. Pet. App. 11a (citing *Zadvydas*, 121 S. Ct. at 2498-99). In applying this test, the court of appeals rejected the government's argument that because Section 1226(c) implicates Congress's plenary authority over immigration, it is subject to only deferential review. Based on *Zadvydas*, the court of appeals found that detention was a "means" of carrying out Congress's plenary immigration authority and thus subject to constitutional constraints. Pet. App. 9a-10a ("The question before us . . . is whether Congress has adopted a constitutionally permissible means of

[6] The court of appeals did not find Section 1226(c) unconstitutional on its face because the statute applies not only to aliens like the respondent who have "entered" the United States ("deportable" aliens), but also to aliens who have not "entered" the United States ("excludable" aliens), and who are therefore not entitled to the same due process protection. The court did not consider the constitutionality of Section 1226(c) as applied to "excludable" aliens and noted that it would present a different question. *See* Pet. App. 6a ("The detention of aliens who have not 'entered' the United States is not before us, and we are not prepared to address, on the record compiled in this case, whether such detention is unconstitutional.").

detention and removal of lawful permanent resident aliens."). The court of appeals observed that "[t]he government made the same plenary powers argument in *Zadvydas* . . . but the Supreme Court rejected it." Pet. App. 10a.

Following this Court's analysis in *Zadvydas*, the court of appeals acknowledged the government's interests in using immigration detention to ensure removal and protect against danger, but held that neither of these interests were sufficient to permit a detention statute that completely eliminates any individualized bond determination. Pet. App. 12a-21a. The court of appeals emphasized that detention under Section 1226(c) is *not* limited to a small group of very dangerous individuals, but applies to individuals convicted of a wide range of crimes, many of whom are eligible for relief from removal,[7] pose no significant danger or flight risk,[8] and are ultimately not even

[7] For example, under *INS v. St. Cyr*, 533 U.S. 289 (2001), some individuals subject to mandatory detention under Section 1226(c) are now eligible for discretionary waivers of removal. Pet. App. 14a. Others are eligible for either withholding or deferral of removal. Pet. App. 13a-14a.

[8] The court of appeals found unpersuasive the government's argument that criminal aliens would fail to appear at their removal hearings, noting that it was based on the erroneous assumption that individuals subject to Section 1226(c) were ineligible for relief and their removal was thus inevitable. Pet. App. 13a (distinguishing *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) on this basis). The court also questioned the government's reliance on an 89% abscondence figure, derived from a 1996 report by the Office of the Inspector General, noting that it was unclear from the report whether the individuals who absconded had been released on bond, or rather, had never been detained in the first instance. Pet. App. 15a-16a. Thus, while the report supported the importance of detention, the court found that it did not support the elimination of individualized bond determinations. *Id.*

ordered deported.[9] Pet. App. 13a-21a. In addition, the court of appeals stressed that the civil detention schemes this Court upheld in *U.S. v. Salerno*, 481 U.S. 739, 747 (1987), *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Carlson v. Landon*, 342 U.S. 524 (1952), contrast sharply with detention under Section 1226(c) because each allowed for individualized bond determinations whereas Section 1226(c) contains "no provision for an individualized determination of dangerousness." Pet. App. 17a-19a.

The court of appeals also noted that the government's arguments in support of Section 1226(c) are substantially undermined by Section 1231(a)(6), which governs post-final-order detention. Pet. App. 22a-23a. In stark contrast to Section 1226(c)'s prohibition on release of criminal aliens during the period that removal proceedings are pending, Section 1231(a)(6), *permits release* of aliens who have actually been ordered removed and who have no claim to remain in the United States, once the 90-day removal period has passed. The court of appeals reasoned that, having been ordered removed, such aliens are likely to present a greater risk of danger and flight. Thus, "[t]he availability of bail for such aliens . . . casts substantial doubt on the argument that aliens merely subject to removal proceedings are so likely to flee and so dangerous that there is a 'special justification' warranting their detention without bail." Pet. App. 22a-23a.

The court of appeals further explained that Section 1226(c) also could not satisfy the more deferential due

[9] In addition to those granted relief from removal, the court of appeals noted that other individuals successfully challenge the classification of their crimes as "aggravated felonies" and are thus determined not to be deportable in the first instance. Pet. App. 14a-15a.

process test articulated by Justice Kennedy in his dissenting opinion in *Zadvydas*. Pet. App. 23a-26a. Under that test, immigration detention is unconstitutional if it is "arbitrary or capricious." Pet. App. 23a (citing *Zadvydas*, 121 S. Ct. at 2515 (Kennedy, J., dissenting)). Quoting the opinion, the court of appeals explained that "'it is neither arbitrary nor capricious to detain . . . aliens when necessary to avoid the risk of flight or danger to the community,' . . . but . . . such detention requires strict procedural safeguards.'" Pet. App. 23a (quoting *Zadvydas*, 121 S. Ct. at 2515 (Kennedy, J., dissenting)). The court of appeals then noted that the dissent "went through a detailed analysis of the regulations governing post-removal-period detention" before concluding that they were constitutionally sufficient. Pet. App. 24a-25a. Because such release procedures are not available under Section 1226(c), the court of appeals concluded that "if we were to apply Justice Kennedy's analysis in *Zadvydas* to the facts of this case, we would conclude that detention under § 1226(c) is arbitrary and capricious and therefore violates due process." Pet. App. 25a-26a.

Finally, the court of appeals acknowledged, but rejected, respondent's argument that Section 1226(c) should be construed as not applying to lawful permanent residents such as the respondent who had not yet been ordered deported by an immigration judge. Pet. App. 27a-29a. The court of appeals noted that "[c]onsidered in isolation, the 'is deportable' language [in Section 1226(c)] could mean 'subject to a final order of removal entered by an IJ.'" Pet. App. 28a. However, the court of appeals believed that this construction was foreclosed by other provisions of the statute and thus concluded that it was "not at liberty to interpret the statute as postponing the

application of the no-bail provision until after the completion of the alien's removal proceeding before the IJ." Pet. App. 29a.

REASONS FOR DENYING THE WRIT

The government's petition for certiorari should be denied because all of the courts of appeals to consider the issue agree that, in light of this Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), Section 1226(c) violates due process. The Third, Ninth and Tenth Circuits have considered Section 1226(c) post-*Zadvydas* and have all reached this conclusion. The only court of appeals to uphold Section 1226(c) – under circumstances that are in any event distinguishable – did so pre-*Zadvydas*, applying an analysis that cannot be reconciled with this Court's reasoning. *See* Point 1, *infra*.

The post-*Zadvydas* decisions reflect a straightforward application of the legal standards enunciated in *Zadvydas*. Indeed, the constitutional failure of Section 1226(c) is more fundamental than the question that troubled this Court in *Zadvydas* since the statute provides *no* procedure whereby an individual can demonstrate suitability for release. This Court has never upheld a detention statute that prohibits any individualized determination of whether the purposes of detention are being served. *See* Point 2, *infra*.

Nor does the court of appeals' decision impede in any way the government's ability to detain and remove criminal aliens. Detention continues to be required of any alien who poses a danger or flight risk. The court's decision requires only an individualized determination by the

Attorney General that detention is warranted on this basis. Moreover, the alien bears the burden of proof and must rebut the presumption of danger or flight risk. Notably, in the instant case the government did not have sufficient interest in detaining the respondent to require even a bond hearing. Instead, the INS made its own determination to release the respondent on a $5,000 bond. *See* Point 3, *infra*.

In light of the current consensus among the courts of appeals, the limited impact these decisions have on INS's detention powers, and the possibility that legislation will be enacted amending Section 1226(c), plenary review is, in any event, premature. If a post-*Zadvydas* split among the courts of appeals were to emerge, plenary review may then be warranted. The constitutionality of Section 1226(c) is currently pending in three other circuits. *See* Point 4, *infra*.

1. a. In *Zadvydas v. Davis*, this Court confirmed that immigration detention is subject to due process constraints and clarified the standard for evaluating the constitutionality of such detention. 533 U.S. 678 (2001). In the wake of that decision, three courts of appeals, in three unanimous opinions, applied the due process test set forth by this Court to the question of mandatory detention under Section 1226(c). All three courts – the Ninth Circuit in the case below, the Tenth Circuit in *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002), and the Third Circuit in *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001) – reached the same result: namely, that Section 1226(c) cannot survive a

straightforward application of the due process test enunciated in *Zadvydas*.[10]

b. Given the absence of a conflict among the post-*Zadvydas* court of appeals' decisions, the government's principal contention is that a split exists because of the Seventh Circuit's pre-*Zadvydas* decision in *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999). Pet. Br. at 11-12. First, and critically, that case pre-dates *Zadvydas* and therefore is not indicative of the Seventh Circuit's view post-*Zadvydas*. The Seventh Circuit has not yet had an opportunity to revisit the issue. Second, the analysis in *Parra* cannot survive *Zadvydas* because it was premised on the view that persons subject to Section 1226(c) have no constitutionally protected liberty interest sufficient to trigger significant due process protection. *Parra*, 172 F.3d at 958 ("[p]ersons subject to § 1226(c) have forfeited any *legal* entitlement to remain in the United States" and thus have "no constitutional right to remain at large" during their removal proceedings). That view is directly contradicted by this Court's holding in *Zadvydas* that even aliens who have received final orders of deportation have a liberty interest in being free from detention that is sufficiently strong to trigger due process protection. *Zadvydas*, 533 U.S. at 693-94, 696. If aliens who have already been ordered deported have a liberty interest sufficient to trigger due process protection, then *a fortiori*, so must aliens subject to Section 1226(c), who are still challenging

[10] All three cases involved lawful permanent residents. In a fourth case, the Third Circuit in a non-precedential decision applied its reasoning in *Patel* to a non-lawful permanent resident – a deportable asylum applicant who had entered the country without inspection. *Radoncic v. Zemski*, 28 Fed. Appx. 113 (3d Cir. 2001).

their removal and who – despite the Seventh Circuit's erroneous assertion to the contrary – have not yet lost the "right to remain" in this country.[11]

Even if it could survive *Zadvydas*, the Seventh Circuit's decision in *Parra* does not create a true conflict since it hinged on a unique set of facts that are not present in the instant case, nor in any of the other post-*Zadvydas* circuit court decisions. As the Seventh Circuit emphasized, *Parra* involved an individual whose removal was "inevitable" since, although he had not yet received a final removal order, he had conceded removability and raised *no claim* for relief that would allow him to remain in the United States. *See Parra*, 172 F.3d at 958 ("[T]he probability of error is zero when the alien *concedes* all elements that require removal (as Parra has done) . . . . "). *See also Patel*, 275 F.3d at 314 (distinguishing *Parra* on this ground). In contrast, all of the post-*Zadvydas* circuit court decisions involve mandatory detention of individuals who are challenging their removal and may well prevail in their proceedings. *See Hoang*, 282 F.3d at 1252-53 (petitioners Nguyen and Trung seeking withholding of removal and relief under Convention Against Torture, petitioner Hoang seeking relief under Convention Against Torture); *Patel*, 275 F.3d at 314 (petitioner "contests the classification of his offense as an aggravated felony, a challenge that could render removal improper"); *Radoncic*, 28 Fed. Appx. at 114-15 (petitioner challenging denial of asylum

[11] In addition, the Seventh Circuit's decision hinged in large part on its view of the deference owed to Congress because of its plenary power over immigration. *Parra*, 172 F.3d at 958. In light of *Zadvydas*, there is no longer any doubt that immigration detention must comport with due process, notwithstanding Congress's plenary power over immigration. *Zadvydas*, 533 U.S. at 695-96.

and withholding). *See also Patel*, 275 F.3d at 314 (holding mandatory detention unconstitutional for aliens "who have not yet been ordered removed because they are pursuing their administrative remedies").

c. The government attempts to contrive a conflict by noting that the Ninth and Tenth Circuit decisions are limited to lawful permanent residents, whereas the Third Circuit's *Radoncic* decision applies to an alien who is in the country illegally after entering without inspection. Pet. Br. at 11-12. This distinction, however, is plainly not a split. First, and critically, the Third Circuit's *Radoncic* decision is "unreported" and designated as "not precedential." *Radoncic*, 28 Fed. Appx. at 113. It thus lacks any binding or precedential value even within the Third Circuit. *See* 3d Cir. I.O.P. 5.3 (designating unreported opinions as "not precedential"); 3d Cir. I.O.P. 5.8 ("unreported opinions" are not binding precedent and are not cited as authority by the court). The Third Circuit, therefore, is free to address the issue in a subsequent case, without regard to the *Radoncic* ruling. Second, none of the other courts of appeals have squarely considered Section 1226(c) as applied to a non-lawful permanent resident. Therefore, how these courts might decide the issue remains an open question.

Finally, although the Ninth and Tenth Circuit decisions are limited to lawful permanent residents, their reasoning is not inconsistent with the *Radoncic* result that Section 1226(c) is unconstitutional as applied to an alien who entered the United States unlawfully. While lawful permanent residents enjoy a favored status under our immigration laws, the Due Process Clause applies to any alien who has entered the United States, even one who entered illegally and whose "presence here is . . . unlawful." *Zadvydas*, 533 U.S. at 693 (citing, *inter alia*, *Plyler v.*

Doe, 457 U.S. 202, 210 (1982)). Thus, Radoncic is entitled to due process protection, notwithstanding his unlawful entry. As the court of appeals made clear, the critical distinction that is constitutionally significant is between aliens who are stopped at the border ("excludable" aliens), and those who are apprehended by the INS after having effectuated an entry – whether legal or illegal ("deportable" aliens). *See* Pet. App. 5a-6a. *See also* n.6, *supra*. No court has held that Section 1226(c) is unconstitutional as applied to excludable aliens.

2. The government focuses most of its petition on arguing that the court of appeals' decision is incorrect, despite uniform application by the courts of appeals of *Zadvydas*. *See* Pet. Br. at 12-18. However, the ruling of the court of appeals correctly applies this Court's decision in *Zadvydas*, and is compelled as well as by this Court's prior decisions in *U.S. v. Salerno*, 481 U.S. 739 (1987), *Foucha v. Louisiana*, 504 U.S. 71 (1992), *Kansas v. Hendricks*, 521 U.S. 346 (1997) and *Carlson v. Landon*, 342 U.S. 524 (1952).

a. The court of appeals' decision reflects a straightforward application of the legal standard enunciated in *Zadvydas*. In *Zadvydas*, this Court emphasized that civil detention is justified only when the government provides a "special justification" that outweighs an individual's liberty interest. 533 U.S. at 690. As the court of appeals correctly held, Section 1226(c) cannot withstand scrutiny under this test since it requires *mandatory* detention for a broad group of aliens, many of whom pose no danger or flight risk.

The government never disputes that Section 1226(c) requires the detention of some individuals who pose no

danger or flight risk. Nonetheless, it tries to justify mandatory detention under Section 1226(c) on the grounds that it applies only to aliens who "have enjoyed full due process protections in connection with [their] convictions" and thus "have *already* been accorded the opportunity for an individualized hearing on the essential predicate for their detention . . . ." Pet. Br. at 13. That is plainly not the question. The "individualized hearing" to which the government refers does not address the constitutionally-significant question of whether the alien presents a flight risk or danger; it refers to the process these individuals previously received on the criminal charges leading to their convictions – for which they have already served their sentences.

The constitutional problem presented by Section 1226(c) is thus even more fundamental than the one presented in *Zadvydas*, since Section 1226(c) involves lawful permanent residents, with no final orders of removal, who are detained without *any* individualized determination that the purposes of detention are being served. *Cf. Zadvydas*, 533 U.S. at 691-92 (emphasizing importance of "strong procedural protections" to ensure that the purposes of detention are being served); *id.* at 721-24 (Kennedy, J., dissenting) (emphasizing that post-final-order detention in *Zadvydas* included procedures for aliens to show they were no longer dangerous, and that more than half of post-final-order detainees were released under these procedures). If the availability of release procedures was insufficient to negate the constitutional concerns regarding indefinite detention of aliens with final orders of removal, then a complete absence of any release procedures for lawful permanent residents who are

detained *without* final orders must present equally profound and even greater constitutional concerns.

The government's argument that the due process analysis in *Zadvydas* is irrelevant, because it concerned indefinite post-final-order detention whereas detention under Section 1226(c) is time-limited (Pet. Br. at 13-14), misses the point. First, under *Zadvydas*, it is the deprivation of liberty that triggers a due process claim. Second, unlike *Zadvydas*, where individuals are entitled to individualized release procedures after only *90-days* of detention (*see* 8 U.S.C. 1231(a)(6)), under Section 1226(c), individuals are denied any possibility of release, despite detention that routinely last months and even years.[12] Moreover, while detention under 1226(c) does not have the

[12] As the court of appeals emphasized, it makes no sense to require detention of aliens *before* they are ordered removed, yet permit their release on bond *thereafter*. Pet. App. 22a-23a ("[D]espite the greater likelihood of flight and dangerousness of aliens already ordered removed, § 1231(a)(6) permits their release on bail."). The government attempts to rationalize this distinction by arguing that the individuals entitled to release under Section 1231(a)(6) are individuals who face potentially permanent detention, since they "cannot be removed . . . within the 90-day removal period" and their "removability therefore may be in serious doubt." Pet. Br. at 14 n.7. But the government has chosen to apply Section 1231(a)(6) not only to criminal aliens whose countries will not take them back, but also to criminal aliens who are seeking judicial review of final BIA removal orders and whose orders have been stayed during that process. *See* Memorandum from Bo Cooper, INS General Counsel, to Regional Counsel, "Detention and Release of Aliens with Final Orders of Removal" (March 16, 2000) (Ex. M of Petitioner-Appellee's Brief before the court of appeals). Like detention under Section 1226(c), such detention is also time-limited, since the process of judicial review – although often prolonged – necessarily comes to an end. Notably, the government offers no rationale for requiring mandatory detention during administrative removal proceedings, but allowing release of these same aliens during a period in which they are seeking judicial review.

same potential for permanence as the post-final-order detention in *Zadvydas*, it is nonetheless often prolonged. *See, e.g.*, *Patel*, 275 F.3d at 313 (petitioner mandatorily detained for eleven months before released on bond following court of appeals' decision); *Bouayad v. Holmes*, 74 F. Supp. 2d 471, 476 (E.D. Pa. 1999) (noting removal proceedings, even those involving detained aliens, "may take several years" to resolve); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 404 (D.N.J. 1999) (alien detained 18 months by INS before winning case before BIA). Mandatory detention under 1226(c) often lasts well beyond the six-month period that this Court found presumptively reasonable for individuals who have already received final removal orders. *Zadvydas*, 533 U.S. at 701.

b. Given that Section 1226(c) necessarily requires the detention of some individuals who pose no danger or flight risk, the government is forced to defend the statute on the grounds that because Congress has plenary power over immigration, 1226(c) is entitled to special deference. Pet. Br. at 16-18. However, this argument – that immigration detention is different from other kinds of detention and thus subject to only the most limited judicial review – was specifically rejected by this Court in *Zadvydas*. *See Zadvydas*, 533 U.S. at 696.

Moreover, as set forth in the court of appeals' decision below, Section 1226(c) also fails the more deferential constitutional test endorsed by Justice Kennedy's *Zadvydas* dissent. 533 U.S. at 718-24 (Kennedy, J. dissenting). The dissent (joined by Chief Justice Rehnquist) found that immigration detention cannot be "arbitrary or capricious," that the government may detain removable aliens who are dangers or flight risks, but that the constitutionality of such detention hinges on "whether there are adequate

procedures" for them to show that "they no longer present special risks or danger." *Id.* at 721. Notably, in evaluating the post-final-order detention in *Zadvydas*, the dissent emphasized two sets of procedures: (1) that aliens subject to post-final-order detention "have been determined to be removable after a fair hearing under lawful and proper procedures," *id.* at 718; and (2) that the post-removal-period detention procedures themselves provided for individualized assessments of danger and flight risk. *Id.* at 722-23. The dissent further stressed that more than half of post-final-order detainees obtained release under these procedures, that "the procedural protection here is real, not illusory[,] and the criteria for obtaining release are far from insurmountable." *Id.* at 723.

In contrast, Section 1226(c) provides none of these procedural protections. Individuals detained under Section 1226(c) have not yet been ordered removed. Thus they have not had the protection of "a fair hearing under lawful and proper procedures." Nor is there any procedure whatsoever that provides for individualized assessment of danger or flight risk. The court of appeals was thus clearly correct in finding that Section 1226(c) would be "arbitrary and capricious" under this standard. Pet. App. 23a-26a.

c. Indeed, the government does not, and has never, cited a single case where this Court has upheld categorical and mandatory detention, as is imposed by Section 1226(c). Every detention scheme upheld by this Court has included an individualized determination that the purposes of detention are being served. For example, the pretrial detention statute upheld by this Court in *Salerno* requires "a full-blown adversary hearing" where the government "must convince a neutral decisionmaker . . . that no conditions of release can reasonably assure the

safety of the community or any person." Pet. App. 17a-18a (citing *Salerno*, 481 U.S. at 750). Similarly, the sexual predator detention statute upheld in *Hendricks* requires that the government prove both dangerousness and mental abnormality beyond a reasonable doubt. Pet. App. 17a-18a (citing *Hendricks*, 521 U.S. at 358). *See also Kansas v. Crane*, 534 U.S. 407 (2002).

The government does not acknowledge the significance of these decisions. Instead, it cites *Carlson v. Landon*, 342 U.S. 524 (1952), and *Reno v. Flores*, 507 U.S. 292 (1993), as examples of this Court rejecting due process challenges to immigration detention. Pet. Br. at 18. But these decisions underscore the uniqueness of Section 1226(c), since the detention schemes in each of these cases provided for the very kind of individualized custody determinations that Section 1226(c) prohibits. *See Carlson*, 342 U.S. at 538, 541-42; *Flores*, 507 U.S. at 313-14. *See also* Pet. App. 19a (noting that "in *Carlson* there was only a presumption, not a certainty, of detention, and the possibility of discretionary release pending the proceedings was central to the Court's approval of the detention scheme").

d. In addition, the government disputes the court of appeals' reasoning that individualized determinations of danger and flight risk are consistent with Congress's objective of ensuring that aliens ordered removed actually appear for deportation. Pet. Br. at 14-17. In support, the government cites various legislative statements and reports. Pet. Br. at 14-16. Yet, none of these sources offer any support for the *mandatory* detention imposed by

Section 1226(c),[13] and the court's view of the reports was, in any event, not critical to its holding. *See also* Point 3.b., *infra*.

3. a. The decision below – and the similar decisions of the Third and Tenth Circuit – will not have the dire effects the government suggests because the ruling does not disturb the Attorney General's authority to detain any criminal alien who presents a danger or flight risk. The holding simply requires that detention be based on a determination that detention is warranted to ensure the alien's deportation or to protect public safety.[14] Significantly, the regulations governing detention establish a presumption of danger and flight risk that the alien must rebut, a standard respondent does not challenge. *See* 8 C.F.R. 236.1(c)(8). Furthermore, in any case where an immigration judge authorizes release over the INS's objection, the agency may appeal the decision and request a stay of the release order. *See* 8 C.F.R. 3.19(f), 3.19(i)(1), 3.38. Indeed, the regulations now provide that any immi-

---

[13] For example, the government places great emphasis on Congress's conclusion that "detention is key to effective deportation." Pet. Br. at 16 (quoting conclusion of the Inspector General's 1996 report on "Deportation of Aliens After Final Orders Have Been Issued"). But the court of appeals' decision acknowledges the government's compelling interest in detaining criminal aliens who pose a danger or flight risk, and holds only that individualized determinations of danger and flight risk would *further*, rather than compromise, the government's objectives. Pet. App. 16a.

[14] Thus, the government's repeated emphasis on the "importance" Congress placed on "detaining criminal aliens during removal proceedings," (Pet. Br. at 12-13), as well as the large numbers of aliens that have been – and continue to be – detained pursuant to Section 1226(c) (*id.*), is beside the point. Nothing in the court of appeals' ruling prevents the INS from detaining criminal aliens who present a danger or flight risk.

gration judge release order is "automatically stayed" if the INS simply files a "Notice of Service Intent to Appeal Custody Redetermination" with the immigration court. *See* 8 C.F.R. 3.19(i)(2). Thus, it is difficult to fathom any case in which an alien whose detention the government believes is warranted would be released.

The limited impact of the court's ruling is further evidenced by the fact that the government has not sought to stay implementation of any of the courts of appeals' decisions invalidating section 1226(c) (nor even sought review of the Third Circuit's seminal *Patel* decision.) Nor has the government sought to stay implementation of the dozens of district court rulings that have ordered bond hearings for individuals detained under Section 1226(c). Moreover, where an immigration judge has thereafter ordered an alien's release on bond, in many cases the INS has not appealed the release order at all. Indeed, in this case the INS, on its own and without requiring an immigration judge hearing, agreed to respondent's release on bond after the district court ordered the INS to make an individualized determination of whether release was warranted. This affirms the court of appeals' conclusion that many aliens subject to mandatory detention pose no danger or flight risk that requires detention.[15]

[15] That individualized bond determinations do not undermine INS's criminal alien removal efforts is further supported by the success of the Transition Period Custody Rules during the two years they were in effect, *see* IIRIRA 303(b)(3), as well as an INS-commissioned study by the Vera Institute for Justice which found high appearance rates for criminal aliens released under the study. *See Patel*, 275 F.3d at 312 n.9 (citing Vera Institute study). Indeed, individualized bond determinations are an accepted part of the criminal justice system. The aliens who are subject to mandatory detention under Section 1226(c) were

(Continued on following page)

b. Nor do the legislative sources and studies cited by the government support its position that mandatory detention of all those encompassed by Section 1226(c) is necessary to achieve Congress's goal of effectuating the deportation of criminal aliens. In many cases, these studies were based on earlier statutory provisions that affected a far narrower class of immigrants than are affected by the provisions currently in place, even under the court of appeals' order.[16] In addition, the studies contain no evidence linking the "no-show" or "absconder" rates to the inaccuracy of individualized bond determinations. Rather, they point to a myriad of factors – ranging from the government's failure to identify criminal aliens upon completion of their criminal sentences, to lack of detention space, to the INS's failure to maintain accurate records of changes of address and to notify aliens of their hearing dates and/or to serve them with surrender orders. *See, e.g.*, Office of the Inspector General, U.S. Dep't of Justice, Inspection Report, Immigration and Naturalization Service Deportation of Aliens After Final Orders

entitled to individual bond hearings in their *criminal* proceedings, and many – if not most – of them were released on bond pending those proceedings.

[16] Under the earlier provisions, the overwhelming majority of aliens, even those with criminal convictions, were entitled to release absent a showing by the government of danger or flight risk. *See, e.g.*, 8 U.S.C. 1252(a) (1994) (limiting presumption of detention to "aggravated felons"). In contrast, under the detention procedure now in place as a result of the court of appeals' order, the presumption of detention applies to a far broader group of individuals, not just those convicted of aggravated felonies – a class which has itself been greatly expanded – but to virtually any alien convicted of a crime.

Have Been Issued, Rep. No. I-96-03 (Mar. 1996), at http://www.usdoj.gov/oig/ i9603/i9603.htm (OIG report).[17]

The government also argues (based on information not available to the court of appeals) that the court of appeals misread the OIG report as *not* supporting a 90% absconder rate for aliens with final orders of deportation. However, even if that were the case – which remains unclear – the court of appeals' interpretation of the report comprised only a small part of its reasoning and was in no way necessary to its holding.[18] Indeed, the court *agreed* with the report's fundamental conclusion that "'[d]etention is key to effective deportation.'" Pet. App. 16a. The critical question is *which* aliens should be detained and what procedures should govern that determination. *See also Patel*, 275 F.3d at 312 (noting that even a 90% failure to appear rate would not justify imprisoning the 10% of aliens "who would dutifully report to proceedings," since

[17] The government cites a 1996 House of Representative report's conclusion that "[a] chief reason why many deportable aliens are not removed from the United States is the inability of the INS to detain such aliens throughout the course of their deportation proceedings." Pet. Br. at 15. However, this referred to the INS's lack of detention space, not the failure of individualized determinations to correctly identify which aliens were likely to flee.

[18] The court's discussion of the OIG report came only after fully explaining why mandatory detention encompasses many aliens who may never be ordered deported and do not present a flight risk. Pet. App. 13a-15a. Indeed, a 90% absconder rate for individuals with final orders of deportation is not a reliable indicator of flight risk for individuals who have not yet been ordered deported and are eligible for relief from deportation.

detention of such aliens "furthers no government goal, while generating a considerable cost to the government").[19]

c. The government has not argued, nor could it, that review is warranted on the ground that the court of appeals' decision in any way jeopardizes national security. Pet. App. 29a-30a.[20] In fact, as previously set forth, the INS has repeatedly argued that Section 1226(c)'s prohibition of individualized determinations of danger and flight risk *inhibits* the agency's enforcement flexibility by forcing it to devote scarce resources to the detention of individuals

[19] Notably, the OIG report did not suggest mandatory detention as the solution to the absconder problem. It proposed a variety of other measures, such as "taking aliens into custody at hearings *when a final order is issued* at the hearing" and "delivering surrender notices personally instead of mailing them to aliens." *See* OIG report at 3, 13 (emphasis added). Nor did either of the House of Representatives reports cited by the government (Pet. Br. at 15) recommend mandatory detention. The proposed statute discussed in House of Representatives Report 104-469(I) endorsed a detention provision almost identical to the one now in place as a result of the court of appeals' decision – release on bond for "lawfully admitted" aliens in deportation proceedings who can demonstrate lack of danger and flight risk. *See* H.R. Rep. No. 104-469, pt. 1 (1996). The proposed statutory amendments discussed in House of Representatives Report No. 104-22 made no mention of detention at all.

[20] For cases of aliens involving national security, special detention provisions apply that are not at issue here. *See* 8 U.S.C. 1226A (2002) (enacted by Section 412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272) (providing for mandatory detention of aliens certified by the Attorney General as suspected terrorists); 8 U.S.C. 1536 (authorizing detention of aliens charged in special terrorist removal proceedings). Notably, Section 1536 allows for individualized bond hearings for lawful permanent residents charged as terrorists, further undermining the need for Section 1226(c)'s prohibition of such hearings. *See* 8 U.S.C. 1536(a)(2). Moreover, national security presents distinct justifications. *See* Pet. App. 29a-30a; *Zadvydas*, 533 U.S. at 695-96.

like the respondent who pose no danger or flight risk. *See* "Legislative Background of 8 U.S.C. 1226(c)," *supra*. Indeed, it was largely because of these concerns, and INS's acknowledged lack of detention space, that Congress agreed to defer implementation of Section 1226(c)'s mandatory detention requirement for two years. *See* IIRIRA 303(b)(2). At present, legislation is pending before the House Judiciary Committee that would restore the Attorney General's discretion to release individuals such as the respondent who pose no danger or flight risk and would negate the need for plenary review.[21]

4. Finally, in this case the INS itself has determined that respondent poses no danger or flight risk and should be released from detention. Thus, the government is seeking to compel the INS to *redetain* an individual it concedes does not need to be detained. This result would further no interest of the government and does not warrant intervention by this Court.[22]

---

[21] The government makes a vague assertion that individualized bond determinations would be "administratively cumbersome." Pet. Br. at 15. But current regulations already provide for an immigration judge custody hearing where individuals such as the respondent can contest whether they are properly subject to mandatory detention under Section 1226(c). *See* 8 C.F.R. 3.19(h)(2)(ii). The court of appeals' ruling merely authorizes immigration judges to also consider danger and flight risk, as they already do in non-criminal alien cases. *See* 8 C.F.R. 3.19(a) & (d), 236.1(c)(8). In any event, the government has provided no evidence of any administrative burden imposed by the court of appeals' ruling.

[22] In addition, in this particular case the constitutional issue can be avoided by construing Section 1226(c) as not applying to a lawful permanent resident such as the respondent who has not yet been ordered deported by an immigration judge. Although respondent raised this statutory argument in the court of appeals and it was rejected, the court's reasoning appears to have been based on an erroneous

(Continued on following page)

Moreover, given the unanimity of the post-*Zadvydas* decisions and the pendency of federal legislation that would significantly ameliorate the scope of Section 1226(c) (and render it inapplicable to respondent), it is premature for the Court to grant plenary review. The constitutionality of Section 1226(c) is currently pending before the Second, Fourth, and Sixth Circuits. *See Zgombic v. Farquharson*, No. 00-6165 (2d Cir.), *Welch v. Ashcroft*, No. 00-7665 (4th Cir.), *Ly v. Hanson*, No. 01-3016 (6th Cir.), and *Danesh v. Jenifer*, No. 01-1735 (6th Cir.). Thus, this Court will have other opportunities to determine if plenary review is warranted.

5. The government has also filed for a petition for a writ of certiorari in *Elwood v. Radoncic*, No. 01-1459, which it identifies as a companion case. For the same reasons set forth here, that petition should also be denied. In addition, the Third Circuit's *Radoncic* decision is a particularly inappropriate vehicle for addressing the

---

assumption – namely, that criminal aliens are not placed in removal proceedings or ordered removed until after they have finished serving their criminal sentences. *See* Pet. App. 28a-29a (noting that the term "is deportable" in Section 1226(c) "could mean 'subject to a final order of removal entered by an IJ[,]' " but concluding that this construction was foreclosed because "[t]he rest of the statute makes clear that the alien is subject to no-bail detention – that is, 'is deportable' – as soon as he or she is released from custody for the criminal conviction."). In fact, Congress intended that criminal aliens would undergo removal proceedings while serving their criminal sentences, and thus would already have orders of deportation by the time they were released from criminal incarceration. *See* 8 U.S.C. 1228(a) (providing for expedited prison removal proceedings for criminal aliens). Thus, construing Section 1226(c) as requiring mandatory detention of lawful permanent residents only if they have been ordered deported by an immigration judge, is consistent with both the plain language of the statute and congressional intent.

issues raised by Section 1226(c) for at least three reasons: First, it is an unpublished decision with no precedential effect either within or outside the Third Circuit. *See* Point 1.c., *supra*. Second, the case presents a substantial mootness question since the government itself states that Radoncic is no longer subject to detention under Section 1226(c), having received a final BIA removal order. Pet. for Cert. in *Radoncic* at 21. *See also* Pet. Br. at 5 ("Detention of an alien following entry of a final order of removal is governed by [8 U.S.C. 1231(a).]"). Indeed, at the time of the court of appeals' decision, Radoncic had already received this removal order, and thus the case was arguably moot at that time. Finally, Radoncic was never properly subject to mandatory detention under Section 1226(c), since he was never charged with deportability on one of the grounds designated under the statute. *Cf. Matter of Ching*, 12 I. & N. Dec. 710, 712-13 (BIA 1968) (construing "is deportable" language in former suspension of deportation provision as requiring actual charge of deportability under the designated ground).[23]

---

[23] The government initially charged Radoncic with removability under 8 U.S.C. 1251(a)(1)(B) (1994) (illegal entry), Pet. Br. in *Radoncic* at 5, and subsequently under an additional ground, Section 1251(a)(1)(E)(i) (1994) (alien smuggling), Pet. Br. in *Radoncic* at 6-7. Neither of these are grounds for mandatory detention under Section 1226(c).

CONCLUSION

In sum, in light of this Court's decision in *Zadvydas*, and the other reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LUCAS GUTTENTAG
LILIANA M. GARCES
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Immigrants' Rights Project
405 14th Street, Suite 300
Oakland, California 94612
(510) 625-2010

JUDY RABINOVITZ
(Counsel of Record)
LEE GELERNT
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Immigrants' Rights Project
125 Broad Street
New York, New York 10004
(212) 549-2618

BRIAN CONDON
ARNOLD & PORTER
777 S. Figueroa Street
44th Floor
Los Angeles, California 90017
(213) 243-4123

Supreme Court, U.S.
FILED

(4)

JUN 11 2002

No. 01-1491

In the Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, ET AL.,
PETITIONERS

v.

HYUNG JOON KIM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

11 pp

TABLE OF AUTHORITIES

Cases:	Page
Hoang v. *Comfort*, 282 F.3d 1247 (10th Cir. 2002)	3, 8
Parra v. *Perryman*, 172 F.3d 954 (1999)	1, 2
Patel v. *Zemski*, 275 F.3d 299 (3d Cir. 2001)	2-3
Plyler v. *Doe*, 457 U.S. 202 (1982)	5
Radoncic v. *Zemski*, 28 Fed. Appx. 113 (3d Cir. 2002)	2
Shaughnessy v. *Mezei*, 345 U.S. 206 (1953)	5
Wong Wing v. *United States*, 163 U.S. 228 (1896)	6
Zadvydas v. *Davis*, 533 U.S. 678 (2001)	3, 6
Statutes and regulations:	
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-586:	
§ 303(b)(2)	7
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:	
8 U.S.C. 1226(c)	1, 2, 3, 4, 5, 6, 7, 8, 9
8 U.S.C. 1228(a)	4
8 U.S.C. 1231(a)	3, 4, 6, 9
8 U.S.C. 1231(a)(6)	6
Miscellaneous:	
H.R. 1452, 107th Cong. (2001)	7
H.R. 1485, 106th Cong. (1999)	8
H.R. 2052, 105th Cong. (1997)	8
H.R. 4966, 106th Cong. (2000)	8
Immigration and Naturalization Service, *Immigrants, Fiscal Year 2000*, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/IMMOOyrbk/IMM/2000.pdf>	2
S. 3120, 106th Cong. (2000)	8

In the Supreme Court of the United States

No. 01-1491

CHARLES DEMORE, DISTRICT DIRECTOR, ET AL.,
PETITIONERS

v.

HYUNG JOON KIM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

In this case, the Ninth Circuit has held unconstitutional an Act of Congress. The court of appeals' decision has great practical importance for thousands of permanent resident aliens who are subject to mandatory detention under 8 U.S.C. 1226(c), and for the effective implementation of the immigration laws. The Ninth Circuit, moreover, has disagreed expressly with the Seventh Circuit's constitutional holding in *Parra* v. *Perryman*, 172 F.3d 954, 958 (1999). See Pet. App. 26a-27a. As the petition explains (Pet. 10-19), certiorari is warranted for those reasons.

1. Respondent asserts that the circuit split identified in the petition (Pet. 11-12) is insignificant because the situation of the alien in *Parra*—a permanent resident

who did not dispute his removability from the United States—was "unique." Br. in Opp. 13. Since 1996, however, the INS has detained more than 75,000 lawful permanent residents and other criminal aliens pursuant to the requirements of Section 1226(c).[1] Many of those aliens do not challenge their removal, because pursuing a non-meritorious claim only prolongs their proceeding and associated detention. See *Parra*, 172 F.3d at 958 ("An alien in Parra's position can withdraw his defense of the removal proceeding and return to his native land, thus ending his detention immediately."). The Ninth Circuit, moreover, did not purport to distinguish *Parra* on the factual grounds respondent suggests. Rather, the court of appeals concluded that *Parra* "was incorrectly decided." Pet. App. 26a.

Respondent attempts to minimize the breadth of the circuit conflict (which involves the Third and Tenth Circuits, as well as the Seventh and Ninth, see Pet. 11-12) by distinguishing *Radoncic* v. *Zemski*, 28 Fed. Appx. 113 (3d Cir. 2002) (No. 01-1074), petition for cert. pending, No. 01-1459 (filed Apr. 9, 2002), as a case involving an alien who entered the United States without inspection. See Br. in Opp. 14-15. As the pending petition in *Radoncic* explains (at 19-22), the factual differences between this case and *Radoncic* provide reason to grant *both* the petition in *Radoncic and* the petition in this case. For purposes of this petition, however, the important point is that *Patel* v. *Zemski*, 275 F.3d 299 (3d Cir. 2001), which involved a permanent

[1] From Fiscal Year 1991 though Fiscal Year 2000, more than nine million aliens were granted permanent resident status in the United States. See Immigration and Naturalization Service (INS), *Immigrants, Fiscal Year 2000*, at 9, Table 2 <http://www.ins.usdoj.gov/graphics/aboutins/statistics/IMM00yrbk/IMM2000.pdf>.

resident alien, aligns the Third Circuit with the Ninth and Tenth Circuits, in direct and express conflict with *Parra*. See *id.* at 313 ("We disagree with the holding in *Parra*."); see also *Hoang* v. *Comfort*, 282 F.3d 1247, 1255-1256 (10th Cir. 2002) (rejecting government's reliance on *Parra*), petition for cert. pending, No. 01-1616 (filed May 3, 2002).

2. Respondent erroneously contends that *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), establishes that *Parra* was wrongly decided. Br. in Opp. 12-13, 15-18. In *Zadvydas*, the Court interpreted 8 U.S.C. 1231(a) to limit the duration of detention of a permanent resident alien *following* his final removal order, thereby avoiding constitutional concerns. See 533 U.S. at 688-701. The critical fact in *Zadvydas* was that the detention provision there at issue otherwise would have authorized "indefinite, perhaps permanent, detention." *Id.* at 699; see also *id.* at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."). The Court removed this constitutional doubt by construing 8 U.S.C. 1231(a) to authorize detention of such aliens only as long as removal is reasonably foreseeable. *Id.* at 699.

No similar judicial limitation on Section 1226(c) is required. Section 1226(c) itself specifies an "obvious termination point" (533 U.S. at 697) for detention, because the provision applies only during the alien's removal proceedings. Detention of an alien who is under a final order of removal is governed by 8 U.S.C. 1231(a), the provision this Court interpreted in *Zadvydas*.

Respondent says that "under *Zadvydas*, it is the deprivation of liberty that triggers a due process claim" and, therefore, the duration of detention is not significant. Br. in Opp. 17. But the *existence* of a due pro-

cess claim does not settle the issue. It is the *strength* of the alien's due process claim in its full context that matters. The duration of detention can be dispositive of the due process analysis, as *Zadvydas* shows.

When he addresses the duration of detention under Section 1226(c), respondent asserts that it "routinely last[s] months and even years." Br. in Opp. 17. That is highly misleading. As a matter of policy, the Executive Office for Immigration Review expedites removal proceedings for aliens who are detained under Section 1226(c). That Office has calculated that its immigration judges (IJs) complete removal proceedings for aliens who are subject to detention under Section 1226(c) in an average time of 47 days.[2] About 85% of the time, the IJ's decision is not appealed to the Board of Immigration Appeals (Board) and becomes final, and the alien thereafter would be detained (if ordered removed) under 8 U.S.C. 1231(a) rather than Section 1226(c). In the relatively small percentage of cases that are appealed to the Board, the average time required for disposition of the appeal—from the filing of the appeal through the Board's issuance of its decision—is approximately four months. Accordingly, detention during the pendency of removal proceedings cannot fairly be compared to the "indefinite, perhaps permanent, detention" of aliens that concerned the Court in *Zadvydas*.

[2] This average processing time is based upon the amount of time between the docketing of the INS's charging document and the issuance of an appealable decision by an IJ, for cases completed in the 2001 fiscal year. The average time does not apply to cases handled by an IJ while the alien is in criminal custody; in that situation, the alien is not detained by the INS pursuant to Section 1226(c). See 8 U.S.C. 1228(a).

3. Respondent focuses his constitutional argument largely upon the fact that detention under Section 1226(c) reflects congressional determinations about the implications of certain criminal convictions, rather than individualized judgments about flight risk and dangerousness. Respondent asserts (Br. in Opp. 15-21) that basing detention upon Congress's judgments violates due process despite Congress's broad powers to classify aliens and to regulate their admission and removal, see *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982), and despite the INS's documented inability to deport many non-detained criminal aliens, see Pet. 14-17.

a. Respondent cites *Zadvydas* for the proposition that this Court should not afford any particular deference to Congress's judgments about the importance of detaining criminal aliens to ensure their removal from the United States. See Br. in Opp. 13 n.11, 18. *Zadvydas*, however, did not overrule the longstanding principle that such judgments deserve particular judicial respect. See, *e.g.*, *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982) ("Congress has developed a complex scheme governing admission to our Nation and status within our borders. The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field.") (citations omitted).

Zadvydas held in relevant part that (1) Congress's exercise of its plenary power over immigration "is subject to important constitutional limitations," and (2) the Constitution may prohibit indefinite detention of deportable aliens whom the Government is unable to

remove. 533 U.S. at 695. The first of those holdings is of course relevant here, but it does not suggest that Section 1226(c) violates due process. The second holding is inapposite. In *Zadvydas*, the INS was unable to implement the aliens' final orders of removal, which itself frustrated Congress's immigration policy. See *id.* at 685-686. In that situation—where the detention of an alien lawfully admitted for permanent residence was not related to the ultimate purposes of detention (to facilitate the foreseeable removal of the alien from the United States)—the Court construed 8 U.S.C. 1231(a)(6) as not reflecting an exercise of Congress's powers over immigration. *Id.* at 695-696, 699. But where removal of an alien is reasonably foreseeable, Congress's immigration-related rationale for detention applies, and the *Zadvydas* Court did not question the constitutionality of extended detention. See *id.* at 699-701.

The detention of aliens covered by Section 1226(c) lasts only as long as an INS charge of removability is pending before an IJ or the Board. It therefore is analogous—not to detention under Section 1231(a) when removal is not foreseeable—but to the detention in aid of foreseeable removal that the *Zadvydas* Court upheld. *Zadvydas* therefore does not dictate the overturning of the congressional judgments that underlie Section 1226(c). See *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.").

b. Respondent suggests that bond hearings would serve Congress's purposes just as well as mandatory detention. See Br. in Opp. 7 n.8, 20-21, 23-25. That

argument is untenable in light of the history of Section 1226(c). As the petition explains (at 14-15), Congress enacted Section 1226(c) because it was dissatisfied with the high rate of flight by criminal aliens under immigration laws that authorized individualized bond hearings. The fact that Congress enacted Section 1226(c) to replace those earlier provisions definitively shows Congress's determination that the case-by-case predictions made by IJs at bond hearings cannot be relied upon to provide adequate protection against criminal aliens' risk of flight and danger to the community.

Congress's contemporaneous awareness of opposition to the mandatory detention provisions of Section 1226(c) (see Br. in Opp. 2-3) undercuts, rather than strengthens, respondent's argument. Although Congress had been made aware that mandatory detention of criminal aliens would tax INS resources and perhaps require a reduction in other INS enforcement efforts, it nevertheless required detention after the expiration of a transitional period of up to two years. See 8 U.S.C. 1226 note (reprinting transition provisions of Section 303(b)(2) of Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-586). It thus cannot be said that Congress adopted mandatory detention without full consideration of its consequences, and it is clear that Congress attached a high priority to mandatory detention when it reformed the immigration laws in 1996. See Pet. 3-4, 14-17 (discussing legislative history).

4. In urging this Court to deny review, respondent invokes a currently pending House bill (H.R. 1452, 107th Cong. (2001)) that, if enacted into law, would affect the scope of Section 1226(c). See Br. in Opp. 3-4. That proposed legislation was introduced by the same sponsor in similar form in earlier Congresses, but was

not reported out of committee. See H.R. 1485, 106th Cong. (1999); H.R. 2052, 105th Cong. (1997). Other bills introduced in past Congresses have proposed changes to Section 1226(c), and they likewise were not enacted. *E.g.*, S. 3120, 106th Cong. (2000); H.R. 4966, 106th Cong. (2000). Presently, there is no foreseeable likelihood that legislation will moot this case. Indeed, the Chairman of the House Immigration and Claims Subcommittee, Representative George Gekas, has joined in the filing of an amicus brief in support of the government's petition in this case.

5. Respondent attaches great significance to his release on bond by the INS's district director. Br. in Opp. 5, 11, 22, 26. The district court, however, had ordered the district director and the Attorney General, as defendants in the habeas corpus case, to provide respondent with an individualized bond hearing. See Pet. App. 50a. Contrary to respondent's suggestion (Br. in Opp. 11), the manner in which the district director complied with the court's order indicates no lack of "interest" by the government in enforcing the requirements of Section 1226(c) against respondent and other criminal aliens whom Congress has ordered detained.

6. Finally, respondent argues that Section 1226(c) can be construed "as not applying to a lawful permanent resident such as the respondent who has not yet been ordered deported by an immigration judge." Br. in Opp. 26 n.22. As the court of appeals held, "such a construction is not available" because it is contrary to the plain language of the statute. Pet. App. 28a; accord *Hoang*, 282 F.3d at 1260-1261. Section 1226(c) contains no exception for permanent residents and no requirement that there be an adjudication of removability before detention. Under respondent's reading, more-

over, Section 1226(c) would be both redundant of, and inconsistent with, Section 1231(a), which specifically addresses detention after a final order of removal. The court of appeals gave Section 1226(c) its only plausible meaning. The court's decision that Section 1226(c), as so construed, is unconstitutional when applied to respondent warrants review by this Court.

* * * * *

The petition for a writ of certiorari should be granted and the case should be set for oral argument in tandem with, or be consolidated for oral argument with, *Elwood* v. *Radoncic*, petition for cert. pending, No. 01-1459 (filed Apr. 4, 2002).

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JUNE 2002

Court, U.S.
FILED
MAY 31 2002
CLERK

(3)

Nos. 01-1491

IN THE
Supreme Court of the United States

CHARLES DEMORE, District Director,
Immigration and Naturalization Service, *et al.*
Petitioners,
v.

HYUNG JOON KIM,
Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. REPS. BOB BARR, JOE BARTON, GEORGE GEKAS, WALTER JONES, LAMAR SMITH, JOHN SWEENEY, AND DAVE WELDON; U.S. SENATOR JESSE HELMS; AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: May 31, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

27P9S

QUESTIONS PRESENTED

Whether Respondent's mandatory detention under 8 U.S.C. § 1226(c) violates the Due Process Clause of the Fifth Amendment, where Respondent was convicted of an aggravated felony after his admission into the United States?

The case also raises the following antecedent question:

Whether a federal district court possesses jurisdiction under 28 U.S.C. § 2241 to set aside the action of the Attorney General in detaining a removable alien who was convicted of an aggravated felony after his admission into the United States, despite 8 U.S.C. § 1226(e)'s admonition that "[n]o court may set aside any action or decision by the Attorney General" to detain an alien under § 1226?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 3

I. REMOVABLE ALIENS CONVICTED OF AGGRAVATED FELONIES HAVE NO DUE PROCESS RIGHT TO REMAIN AT LIBERTY WITHIN AMERICAN SOCIETY WHILE THEY CONTEST THEIR REMOVAL 5

A. Keys to His Own Jail Cell 12

B. Kim's Detention Is a Direct Result of His Conviction 13

II. *ZADVYDAS* IN NO WAY LESSENS THE NEED FOR THIS COURT TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS . 15

III. THE COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE WHETHER LOWER FEDERAL COURTS HAVE JURISDICTION TO OVERTURN § 1226(c) DETENTION DECISIONS 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases:

Fiallo v. Bell,
430 U.S. 787 (1977) 8
Hampton v. Mow Sun Wong,
426 U.S. 88 (1976) 8
Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 9
Hoyte-Mesa v. Ashcroft,
272 F.3d 989 (7th Cir. 2001) 17
INS v. St. Cyr,
121 S. Ct. 2771 (2001) 6, 12, 20
Jones v. United States,
463 U.S. 354 (1983) 12, 14
Kansas v. Hendricks,
521 U.S. 346 (1997) 4, 13
Mathews v. Diaz,
426 U.S. 67 (1976) 9
Mathews v. Eldridge,
424 U.S. 319 (1976) 7
Miller v. Albright,
523 U.S. 420 (1998) 8-9
Palko v. Connecticut,
302 U.S. 319 (1937) 7
Parra v. Perryman,
172 F.3d 954 (7th Cir. 1999) . . . . . *passim*
Poe v. Ullman,
367 U.S. 497 (1961) 8
Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999) 18-19

Page

Rochin v. California,
342 U.S. 165 (1952) 7
United States v. Salerno,
481 U.S. 739 (1987) 7
United States v. Valenzuela-Bernal,
458 U.S. 858 (1982) 8
Youngberg v. Romeo,
457 U.S. 307 (1982) 8
Zadvydas v. Davis,
533 U.S. 678 (2001) . . . . . *passim*

Statutes and Constitutional Provisions:

U.S. Const., art. i, § 9, cl. 2, Suspension Clause 20
U.S. Const., amend. v, Due Process Clause . . . . *passim*

Illegal Immigration Reform and Immigrant Responsibility Act of 1996,
Pub. L. No. 104-208, 110 Stat. 3009-546 2

8 U.S.C. § 1101(a)(43)(G) 2, 6, 20
8 U.S.C. § 1226 . . . . . 5, 18, 19
8 U.S.C. § 1226(c) . . . . . *passim*
8 U.S.C. § 1226(e) 5, 17, 18, 19, 20
8 U.S.C. § 1227(a)(2)(A)(iii) 2, 4, 14
8 U.S.C. § 1229b(a)(3) 6
8 U.S.C. § 1231(a)(6) 16
8 U.S.C. § 1231(b)(3)(B)(ii) 5
8 U.S.C. § 1252(g) 19

INA § 212(c) (repealed), 8 U.S.C. § 1182(c) (1995) . . . 6

28 U.S.C. § 2241 17

Page

Miscellaneous:

142 Cong. Rec. 7972 (1995) 10

62 Fed. Reg. 10,312 (1997) 11

SUP. CT. R. 14.1(a) 17

Los Angeles County Wide Criminal Justice Coordination Comm., "Impact of Repeat Arrests of Deportable Aliens in Los Angeles County," July 15, 1992 10

BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. REPS. BOB BARR, JOE BARTON, GEORGE GEKAS, WALTER JONES, LAMAR SMITH, JOHN SWEENEY, AND DAVE WELDON; U.S. SENATOR JESSE HELMS; AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI CURIAE

The interests of *amici curiae* Washington Legal Foundation, *et al.*, are set forth in the motion for leave to file a brief in *Elwood v. Radoncic,* No. 01-1459, which involves issues substantially similar to those raised herein.[1] *Amici* are filing their motion and brief in *Elwood* simultaneously with the filing of this brief. *Amici* are filing this brief with the consent of all parties. Letters of consent have been lodged with the clerk.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate by reference the Statement contained in the Petition for a Writ of Certiorari. In brief, Hyung Joon Kim is 24-year-old citizen of Korea who has been a permanent resident alien living in California since 1986. The Immigration and Naturalization Service (INS) has been seeking his removal from the country because of his repeated criminal offenses.

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

Mr. Kim's *adult* criminal record dates to July 1996, when he was convicted at age 18 of first degree burglary in California state court. Pet. App. 2a. In August 1997, he was convicted in California state court of "petty theft with priors," and was sentenced to three years imprisonment. *Id.* After serving 18 months of that sentence, he was release to the custody of the INS on February 2, 1999. *Id.* The INS in 1998 had charged him with being a deportable alien under 8 U.S.C. § 1227(a)(2)(A)(iii) because he had been convicted of an "aggravated felony" within the meaning of 8 U.S.C. § 8 U.S.C. § 1101(a)(43)(G). Mr. Kim's removal hearing before an Immigration Judge was scheduled for March 2002 but has been delayed at his request.

One year prior to Mr. Kim's aggravated felony conviction, Congress adopted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, which *inter alia* added a new § 236(c) to the Immigration and Nationality Act, 8 U.S.C. § 1226(c). Section 1226(c) *requires* the INS (with one exception not relevant here) to take into custody, pending removal, any alien deportable by reason of having been convicted of an aggravated felony. Section 1226(c) is merely the latest federal mandatory detention statute; a series of federal statutes dating back to 1988 required detention pending deportation of various categories of alien criminals. *See* Pet. App. 35a-36a.

After bringing charges against Mr. Kim, the INS determined that § 1226(c) precluded his release on bond. *Id.* at 33a. On May 17, 1999, Mr. Kim filed a habeas corpus petition in U.S. District Court for the Northern District of California, seeking release from detention. On August 11, 1999, the district court granted the petition. *Id.* at 31a-51a.

The court held that § 1226(c) was facially invalid as a violation of both substantive and procedural due process because: (1) the Constitution prohibits the detention of aliens in the absence of evidence that they pose a risk of flight or a threat to the community; and (2) aliens are entitled to an "individualized bond hearing" to determine whether they pose a risk of flight or a threat to the community. The INS subsequently released Mr. Kim on $5,000 bond. *Id.* at 2a.

On January 9, 2002, the U.S. Court of Appeals for the Ninth Circuit affirmed. *Id.* at 1a-30a. The appeals court did not concur with the district court's holding that § 1226(c) was facially invalid, but it held that § 1226(c) is unconstitutional as applied to Mr. Kim and similarly situated permanent resident aliens. *Id.* at 6a. The court held that Mr. Kim had "an obvious and important" due process interest in liberty "during the pendency of removal proceedings." *Id.* at 8a. The court held that that liberty interest outweighed the INS's justifications for seeking to detain him -- including preventing him from fleeing and protecting public safety -- in the absence of "an individualized determination" that he posed a risk of flight or a risk to public safety. *Id.* at 12a-21a, 30a.

REASONS FOR GRANTING THE PETITION

Amici fully support the arguments put forth by Petitioners (hereinafter, the "INS"). The Ninth Circuit has held an Act of Congress unconstitutional; that alone warrants review of the court of appeals decision. Moreover, the appeals court's decision directly conflicts with a decision of the U.S. Court of Appeals for the Seventh Circuit.

Amici write separately in order to emphasize several points. First, the appeals court's decision is directly contrary

to numerous decisions of this Court. The Ninth Circuit failed to accord the deference demanded by this Court to decisions of Congress and the Executive Branch with respect to immigration matters. That failure is particularly troubling in light of overwhelming evidence that: (1) aliens released from detention pending deportation after having been convicted of aggravated felonies pose a serious public safety risk; (2) the INS has no effective means of assuring the removal of alien felons following the completion of administrative proceedings unless it can detain them while those proceedings are ongoing; and (3) in a very real sense, alien felons being detained pending deportation hold the keys to their jail cells because they can win their freedom at any time so long as they agree to leave the country while their administrative appeals are pending.

Second, the Ninth Circuit's reliance on *Kansas v. Hendricks*, 521 U.S. 346 (1997), and other civil commitment case law was misplaced. Mr. Kim was convicted of an "aggravated felony" in 1997 after being afforded all the constitutional rights to which criminal defendants are entitled -- *e.g.*, right to assistance of counsel, trial by jury, innocence until proven guilty by proof beyond a reasonable doubt. Congress in 1996 established several consequences of such convictions when the criminal defendant is an alien: deportability (under 8 U.S.C. § 1227(a)(2)(A)(iii)) and mandatory detention until removal can be effected (under § 1226(c)). Mr. Kim has no more right to complain about his detention for a finite period under § 1226(c) than he does to complain about the three-year sentence he received under California state law.

Third, the Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), in no way reduces the need to resolve the

conflict between the decision below and the Seventh Circuit's decision in *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999). *Parra* is fully consistent with this Court's *Zadvydas* decision, and the Seventh Circuit has given no indication since *Zadvydas* was decided in June 2001 that it is considering abandoning its *Parra* decision.

Fourth, Congress has unambiguously decreed that the federal courts are not to "set aside any action or decision" of the INS taken pursuant to 8 U.S.C. § 1226 "regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e). It is undisputed that the INS acted pursuant to 8 U.S.C. § 1226 in determining that Mr. Kim should be detained pending removal. Accordingly, the Court should grant review in this case to determine whether the lower courts possessed jurisdiction to overturn the INS's decision to detain Mr. Kim; § 1226(e) clearly suggests that they did not.

I. DEPORTABLE ALIENS CONVICTED OF AGGRAVATED FELONIES HAVE NO DUE PROCESS RIGHT TO REMAIN AT LIBERTY WITHIN AMERICAN SOCIETY WHILE THEY CONTEST THEIR REMOVAL

Mr. Kim has been convicted as an adult of two criminal offenses, including a serious felony for which he was sentenced to three years imprisonment. Although he is contesting removal, he almost surely will be deported to Korea because he is statutorily ineligible for withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(B)(ii).[2] Congress has

---

[2] The Ninth Circuit's suggestions to the contrary are frivolous.

(continued...)

decreed that those in Mr. Kim's position "shall" be detained by the INS pending removal. The Ninth Circuit nonetheless ruled that Mr. Kim has a substantive due process right to be free from detention while he contests the removal order, in the absence of an "individualized" finding that he poses either a risk of flight or a threat to the community.

In so holding, the Ninth Circuit did not merely dismiss considered views to the contrary from both Congress and the Seventh Circuit. Its decision is also in conflict with numerous decisions of this Court that have emphasized the need for the federal courts to defer to the views of the elected branches of government in immigration-related matters. The Court should grant review to resolve that conflict.

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the federal government may take an action depriving

---

[2](...continued)
The Ninth Circuit noted that some alien felons, particularly those convicted of felonies in the distant past, are eligible for discretionary relief under former § 212(c), 8 U.S.C. § 1182(c) (1995). Pet. App. 14a. But Mr. Kim's most recent felony conviction dates from 1997, after the repeal of § 212(c); accordingly, he is not even arguably eligible to invoke that statute. *See INS v. St. Cyr,* 121 S. Ct. 2771, 2293 (2001); *see also* 8 U.S.C. § 1229b(a)(3). The Ninth Circuit also asserted that "some aliens detained under [§ 1226(c)] may be able to demonstrate that the conviction for which the INS seeks to remove them was not an aggravated felony." Pet. App. 14a. That assertion undoubtedly is correct, but it is of little relevance to Mr. Kim and his as-applied challenge to § 1226(c) because there is no dispute that he has, in fact, been convicted of an "aggravated felony" within the meaning of 8 U.S.C. § 11101(a)(43).

a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

But the Court has recognized that the Due Process Clause also includes a categorical prohibition against certain extreme forms of government conduct that result in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due process," "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno,* 481 U.S. 739, 746 (1987) (quoting *Rochin v. California,* 342 U.S. 165, 172 (1952), and *Palko v. Connecticut,* 302 U.S. 319, 325-326 (1937)). *Amici* submit that there is nothing "shock[ing to] the conscience" about a federal law that mandates detention of removable aliens who have been convicted of aggravated felonies and who wish to remain in the United States while they contest their removal, particularly where detention is limited to the relatively brief period necessary for all removal proceedings to be completed.[3]

Government detention of individuals -- even noncitizens -- unquestionably implicates the Due Process Clause's prohibition against unwarranted deprivations of "liberty." As the Court has made clear, "Freedom from imprisonment -- from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that Clause

---

[3] Although the Ninth Circuit was not altogether clear on this point, *amici* do not understand the appeals court to have held that the INS violated Mr. Kim's rights to *procedural* due process. The appeals court indicated that the Constitution prohibited Mr. Kim's detention in the absence of individualized findings that he presented a flight risk or a threat to safety, *without regard to how much process the INS afforded him* before taking him into custody. Pet. App. 10a-11a.

protects." *Zadvydas*, 121 S. Ct. 2491, 2498 (2001). But the federal government will often have legitimate reasons to impinge on personal liberty, and any claim that abridgement of personal freedom "shocks the conscience" must be judged in light of the government's justifications for its actions:

> In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and the "demands of organized society." *Poe v. Ullman,* 367 U.S. 497, 542 (1961)(Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty.

Youngberg v. Romeo, 457 U.S. 307, 320 (1982).

When that balancing process is undertaken within the context of immigration matters, the balance tilts decidedly in favor of upholding federal restraints on the liberty of noncitizens imposed by Congress and the Executive Branch in the name of national security and safety. Indeed, when it comes to matters of immigration policy, the judicial branch has a very limited role to play. "The power to regulate immigration -- an attribute of sovereignty essential to the preservation of any nation -- has been entrusted by the Constitution to the political branches of the Federal Government." *United States v. Valenzuela-Bernal,* 458 U.S. 858, 864 (1982). As a result, the Court has "underscore[d] the limited scope of judicial inquiry" into immigration-related matters. *Fiallo v. Bell,* 430 U.S. 787, 792 (1977). "The power over aliens is of a political character and therefore subject only to narrow judicial review." *Hampton v. Mow Sun Wong,* 426 U.S. 88, 101 n.21 (1976). *Accord, Miller v.*

Albright, 523 U.S. 420, 455 (1998) (Scalia, J., concurring) ("Judicial power over immigration and naturalization is extremely limited.").

As the Court has explained:

> "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting *Harisiades v. Shaughnessy,* 342 U.S. 580, 588-89 (1952)).

In conflict with this Court's case law, the Ninth Circuit declined to defer to Congress's judgment that sound immigration policy requires the detention of deportable aliens who have been convicted of aggravated felonies. Pet. App. 10a-11a. The appeals court asserted that this Court's decision in *Zadvydas* dictated that no deference be accorded. *Id.* But that assertion was a misreading of *Zadvydas*. The appeals court's quotation from *Zadvydas*, *id.* at 11a, involved a discussion of case law arising from government detention of *citizens*; but as even the Ninth Circuit recognized, "'In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Id.* at 9a (quoting *Mathews v. Diaz*, 426 U.S. at 79-80). *Zadvydas* does not indicate that the courts should not defer to Congress's judgment that alien felons should be detained during the brief period required to effect their removal. Rather, the Court

stated expressly that it was addressing the limited issue of "whether aliens that the Government finds itself unable to remove are to be condemned to an *indefinite* term of imprisonment within the United States." *Zadvydas*, 121 S. Ct. at 2502-03. The Court held that under those limited circumstances, *indefinite* detention raised serious constitutional concerns despite the substantial deference due to Congress's decisions.

In adopting § 1226(c), Congress determined that release of alien felons pending removal would entail such an extraordinarily high risk of flight and of danger to the community that detention of all such aliens (pending completion of removal proceedings) was mandated. In conflict with numerous decisions of this Court, the appeals court refused to defer to Congress's assessment of the risks involved. Congress had good reason to fear that release of alien felons pending removal posed a significant risk to public safety. For example, a General Accounting Office report cited during floor debates by a House sponsor of 1996 immigration reform legislation found that "77 percent of noncitizens convicted of felonies are arrested at least one more time" before being deported. 142 Cong. Rec. 7972 (1995). A major study of criminal aliens conducted by Los Angeles County reached a similar conclusion. Los Angeles County Wide Criminal Justice Coordination Committee, "Impact of Repeat Arrests of Deportable Aliens in Los Angeles County," July 15, 1992. The study traced the activity of 1,875 inmates released from Los Angeles County jail in May 1990 who had been identified by the INS as "deportable aliens." Of those 1,875, 772 had been rearrested *within one year*, and those 772 had been arrested a total of 1,522 times. *Id.* at iv.

The INS introduced substantial evidence in this case that alien felons released on bond pending removal also pose a significant risk of flight. For example, the INS cited a study indicating that 90% of criminal aliens not detained during removal proceedings end up fleeing.[4] Rather than deferring to Congress's judgment that this evidence justified detention of all alien felons, the Ninth Circuit re-interpreted the study's data and arrived at the remarkable conclusion that releasing aliens on bond *decreases* the skip rate and is thus "key to effective deportation." Pet. App. 16a. The court also asserted that substantive due process prohibited the INS from detaining any alien felon unless it could demonstrate that *that* alien posed a danger to public safety: "the fact of a prior conviction alone, without individualized consideration of the dangerousness of the underlying crime, or of the individual's present condition, can be unreliable evidence of dangerousness." *Id.* at 20a.

In refusing to defer to Congress's considered judgment on this issue, the Ninth Circuit appeared to assume that an individual felon's propensity to flee or to commit additional crimes could be determined as a factual matter. That assumption is without foundation; there is never any means by which government officials can predict future behavior of any given individual with 100% accuracy. All Congress can be expected to do is to use available information to predict how a class of individuals is likely to behave if released from detention. It has determined that *any* alien in Mr. Kim's

---

[4] The Seventh Circuit relied in part on this study in rejecting a due process challenge to § 1226(c)'s mandatory detention provision. *Parra*, 275 F.3d at 956 (citing 62 Fed. Reg. 10,312, 10,323 (1997)). As the INS points out in the Petition, the Ninth Circuit's rejection of the study as support for the INS's position was based on a misreading of the study's findings. Pet. 17.

position is much more likely than not, if released from detention while removal proceedings continue, either to flee or to commit additional crimes. The Ninth Circuit's refusal to accept that determination is in conflict with the numerous decisions of this Court that have counseled judicial deference to the political branches of government on immigration matters. *See, e.g., INS v. St. Cyr,* 121 S. Ct. 2271, 2287 n.38 (2001) ("the scope of review on habeas [in immigration cases] is considerably more limited than on APA-style review"). *See also Jones v. United States,* 463 U.S. 354, 364 n.13 (1983) ("The lesson we have drawn [from the difficulty in predicting future dangerousness] is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.")

A. Keys to His Own Jail Cell. In contrast to the government's strong interest in detaining him, Mr. Kim has a minimal "liberty" interest in being allowed to roam freely in American society. Indeed, Mr. Kim's detention was not solely or even primarily the INS's doing. In a very real sense, Mr. Kim at all times held the keys to his cell. Unlike aliens such as Mr. Zadvydas (who could not locate a country willing to admit him), Mr. Kim was free to leave detention provided that he agree to return to his native Korea. Accordingly, when deportable aliens such as Mr. Kim (who, in light of their aggravated felony convictions, have virtually no chance of avoiding removal and regaining their right to live freely in American society) choose incarceration as the price for remaining in this country, their claims that incarceration is depriving them of Fifth Amendment "liberty" ring hollow.[5]

---

[5] The Ninth Circuit placed considerable emphasis on the fact that (continued...)

B. Kim's Detention Is a Direct Result of His Conviction. In support of its finding that Mr. Kim's substantive due process rights were violated, the Ninth Circuit relied on *Kansas v. Hendricks*, 521 U.S. 346 (1997), and other "civil" commitment cases in which the Court has placed substantive due process restrictions on the power of government to detain citizens in connection with noncriminal proceedings. Pet. App. 11a, 17a-18a. The appeals court said:

> Existing Supreme Court precedents establish that civil detention will be upheld only when it is narrowly tailored to people who pose an unusual and well-defined danger to the public. In such cases the government has had the burden of proving that the particular individual meets the criteria for detention.

Id. at 17a.

Leaving aside that the cited precedents all involved detention of *citizens*, the Ninth Circuit's analysis fails to account for the fact that Mr. Kim was convicted of an aggravated felony. Congress in 1996 established several consequences of such convictions when the criminal

---

[5](...continued)
Mr. Kim retains his status as a "permanent resident alien" until a final order of removal is entered against him. Pet. App. 7a-8a. But the level of rights that comes with that status is not constitutionally mandated; rather, any such rights (beyond those rights that are possessed by *any* alien) are a product of federal statutes and regulations. While Congress has chosen to grant numerous rights to permanent resident aliens, one right that it has *not* granted is the right to remain free in American society if a permanent resident alien is deportable by virtue of having committed an aggravated felony. 8 U.S.C. § 1226(c).

defendant is an alien: deportability (under 8 U.S.C. § 1227(a)(2)(A)(iii)) and mandatory detention until removal can be effected (under § 1226(c)). Mr. Kim, who was convicted a year after § 1226(c) was adopted, has no more right to complain about his detention for a finite period under § 1226(c) than he does to complain about the three-year sentence he received under California state law.

The Ninth Circuit makes much of the fact that removal proceedings are civil in nature. But § 1226(c) limits mandatory detention to those convicted of an aggravated felony -- meaning that detention is limited to those who have been afforded all the safeguards of the criminal process, including assistance of counsel, trial by jury, and innocence until proven guilty by proof beyond a reasonable doubt. Moreover, a principal purpose of § 1226(c) is also a principal purpose of the criminal justice system: incapacitating criminals so as to protect public safety. When a defendant is convicted of a crime, we do not require prosecutors requesting a jail sentence to separately prove that he continues to pose a danger to society. Rather, the fact that a person has been found to have committed a criminal act "indicates dangerousness" and is "strong evidence that his continued liberty could imperil the preservation of the public peace" -- even if the case involves "a non-violent crime against property." *Jones v. United States*, 463 U.S. 354, 364-65 (1983). If courts are permitted to make that presumption in connection with criminal sentencing, there is no reason why Congress should not be permitted to make the same presumption in establishing finite periods of detention as part of its immigration policy.

In sum, review is warranted of the Ninth Circuit's determination that Mr. Kim's "liberty" interest in being released into American society outweighs the government's interest in detaining, pending removal, *all* aliens who have been convicted of aggravated felonies, as a means of preventing flight and protecting public safety.

III. *ZADVYDAS* IN NO WAY LESSENS THE NEED FOR THIS COURT TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS

The Ninth Circuit acknowledged that its decision striking down § 1226(c) was in conflict with the Seventh Circuit's *Parra* decision. Pet. App. 26a. The Ninth Circuit suggested, however, that any conflict was unlikely to persist because *Parra* had been superseded by *Zadvydas*: "*Parra* [was] decided prior to *Zadvydas*, in which the Court made clear that the government was required to provide 'special justification' for civil detention of aliens." *Id.*

The Ninth Circuit's suggestion is misguided; there is no inconsistency between *Parra* and *Zadvydas*. This Court made clear in *Zadvydas* that the detention of those who once were classified as permanent resident aliens -- even permanent resident aliens who have been convicted of aggravated felonies -- implicates the Due Process Clause. But the Seventh Circuit in *Parra* did not hold otherwise; it merely held that the minimal "liberty" interests of the alien felon being detained in that case were insufficient to overcome the INS's strong interests in detaining him. *Parra*, 172 F.3d at 958. That holding is in direct conflict with the Ninth Circuit's holding in this case: the Ninth Circuit found that the due process balance tilted in favor of the alien felon seeking release into American society.

Zadvydas involved an entirely different balancing process. That case involved permanent resident aliens from Lithuania and Cambodia who, although subject to final removal orders, could not be sent anywhere in the foreseeable future because no country was willing to accept them. The Court concluded:

> [T]he issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States. . . An alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, . . . the Constitution permits detention that is indefinite and potentially permanent.

Zadvydas, 121 S. Ct. at 2502.[6]

In sharp contrast, this case and *Parra* both involved alien felons whose removal proceedings were ongoing. Unlike in *Zadvydas*, neither Mr. Kim nor Mr. Parra faced "indefinite and potentially permanent" detention (because removal proceedings would be completed within a relatively short period of time). Moreover, because there is no evidence that Korea is unwilling to accept Mr. Kim or that Mexico was unwilling to accept Mr. Parra, both were free to end their detention at any time by leaving the country. Accordingly, nothing in this Court's *Zadvydas* decision is

[6] The Court did not answer that "serious question." Rather, it invoked the doctrine of constitutional doubt to interpret 8 U.S.C. § 1231(a)(6) as prohibiting detention of such aliens for more than six months after completion of the deportation process, if "there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 121 S. Ct. at 2505.

likely to cause the Seventh Circuit to reassess its conclusion that § 1226(c) passes constitutional muster,[7] and the conflict between the Ninth and Seventh Circuits is likely to persist until resolved by this Court.

III. THE COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE WHETHER LOWER FEDERAL COURTS HAVE JURISDICTION TO OVERTURN § 1226(c) DETENTION DECISIONS

The Court should also grant review to consider an issue not raised in the petition: whether lower federal courts have jurisdiction to overturn § 1226(c) detention decisions. It is always appropriate, of course, for a court *sua sponte* to raise the issue of its own jurisdiction, and the jurisdictional issue is a "subsidiary question fairly included" within the question presented by Petitioner. SUP. CT. R. 14.1(a).

The district court and Ninth Circuit asserted jurisdiction over this case under the federal habeas statute, 28 U.S.C. § 2241. However, 8 U.S.C. § 1226(e) clearly suggests that no such jurisdiction exists in the lower federal courts:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside *any action or decision* by the Attorney General under this section regarding the

[7] The Seventh Circuit has been called upon to apply *Zadvydas* in several recent cases. Although none of those cases addressed § 1226(c), none of the opinions contains language suggesting that *Parra*'s continued vitality is subject to question. *See, e.g., Hoyte-Mesa v. Ashcroft*, 272 F.3d 989 (7th Cir. 2001).

detention or release of any alien or the grant, revocation, or denial of bond or parole. (Emphasis added.)

There is no question that following Mr. Kim's release from state prison in February 1999, the INS detained him "under this section," *i.e.*, under 8 U.S.C. § 1226. Accordingly, the only plausible reading of § 1226(e) is that Congress intended to prohibit federal courts from "set[ting] aside" the INS's decision to detain Mr. Kim and other similarly situated criminal aliens.

Although each of the appeals courts to consider the issue has held that § 1226(e) is *not* a bar to habeas corpus claims such as Mr. Kim's, those courts have arrived at their decisions by simply ignoring the plain statutory language. The Seventh Circuit evaded the jurisdictional bar in *Parra* by claiming that § 1226(e) prohibits only "[t]wo particular avenues of attack" on detention decisions: (1) an argument that the Attorney General erred in applying § 1226 to an alien; and (2) an argument that he erred in deeming the alien statutorily ineligible for bail. *Parra*, 172 F.3d at 957. The court held that "[a] person who has different legal arguments may present them," including an argument that detention is improper because § 1226(c) is unconstitutional. *Id.* That interpretation of § 1226(e) is not plausible. The second sentence of § 1226(e) does not state that certain types of detention decisions or certain types of legal challenges to detention are barred; rather, it states categorically that "[n]o court may set aside" an INS decision to detain an alien felon pursuant to § 1226.[8]

---

[8] The Seventh Circuit attempted to draw support from this Court's interpretation of another jurisdiction-limiting statute in *Reno v.* (continued...)

The Ninth Circuit likewise held that § 1226(e) does not bar judicial review of a habeas corpus challenge to INS detention of an alien felon under § 1226. But it did so without any real analysis; it simply cited to *St. Cyr* and stated in conclusory fashion: "The district court had jurisdiction pursuant to 28 U.S.C. § 2241." Pet App. 2a.

Amici recognize that there is "a strong presumption in favor of judicial review of administrative action," and that the Court has a "rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr*, 121 S. Ct. 2271 (2001). Nonetheless, there is no plausible interpretation of § 1226(e) other than that Congress intended to preclude *all* lower-court review of an INS decision to detain an alien felon pursuant to § 1226.[9] The Court should

---

[8](...continued)
American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). The comparison was not well-taken. The statute at issue in *American-Arab*, 8 U.S.C. § 1252(g), sharply limits judicial review of claims by an alien "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against an alien under this Act." The Court concluded that § 1252(g) imposed limits on judicial review *only* when the plaintiffs' claims addressed one of the three types of "decision[s] or action[s]" enumerated in § 1252(g); but the Court made clear that § 1252(g) applied *regardless* of the grounds raised by the alien to challenge the Attorney General's decisions or actions in these three areas. *American-Arab*, 525 U.S. at 482-83. Similarly, 8 U.S.C. § 1226(e) prohibits a court from "set[ting] aside" a decision by the Attorney General to detain an alien felon pursuant to § 1226, *regardless* of the basis for challenging detention.

[9] Section 1226(e) could plausibly be read as not barring claims that the detainee is not actually an alien or has not actually been convicted of an aggravated felony. Detention in such circumstances argu- (continued...)

grant the petition to consider whether the Ninth Circuit erred in asserting jurisdiction over Mr. Kim's claim.

The only plausible basis for upholding the Ninth Circuit's assertion of jurisdiction is a finding that § 1226(e) is void as a violation of the Suspension Clause of the Constitution. In light of *St. Cyr*, any effort to deny judicial review of INS detention decisions raises a "serious question" under the Suspension Clause. Nonetheless, *amici* note that the Court has never invoked the Suspension Clause to strike down a federal statute. Moreover, given the strong presumption of constitutionality of federal legislation, the Court should not permit federal courts to assert jurisdiction over a claim in violation of a federal statute without first granting review to determine whether the statute is constitutional.

CONCLUSION

Amici curiae respectfully request that the Court grant the Petition.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036

Date: May 31, 2002

---

[9](...continued)
ably is not detention "under this section," thereby rendering the statutory bar inapplicable. However, Mr. Kim does not contest that he is an alien or that the crimes of which he stands convicted are "aggravated felonies" within the meaning of 8 U.S.C. § 1101(a)(43).

Supreme Court, U.S.
FILED
AUG 29 2002
CLERK

No. 01-1491

In the Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HYUNG JOON KIM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

THEODORE B. OLSON *
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

*Counsel of Record for Petitioners

JUDY RABINOVITZ*
LEE GELERNT
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street
New York, New York 10004
(212) 5.. ..-2618

LUCAS GUTTENTAG
LILIANA M. GARCES
American Civil Liberties Union Foundation
Immigrants' Rights Project
405 14th Street
Suite 300
Oakland, CA 94612
(510) 625-2010

*Counsel of Record for Respondent

PETITION FOR WRIT OF CERTIORARI FILED: APR. 9, 2002
CERTIORARI GRANTED: JUNE 28, 2002

TABLE OF CONTENTS

	Page
District Court docket entries (excerpts)	1
Court of Appeals docket entries (excerpts)	5
Petition for Writ of Habeas Corpus (N.D. Cal. filed May 7, 1999)	7
Notice of Custody Determination	11
Memorandum for File re. Bond Consideration (not in case record)	14
DOJ, Inspection Report (Rep. No. I-96-03) (not in case record)	15

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO)

No. 99-2257

HYUNG JOON KIM, PETITIONER

v.

THOMAS SCHILTGEN, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, AND JANET RENO, UNITED STATES ATTORNEY GENERAL, RESPONDENTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
5/17/99	1	PETITION FOR WRIT OF HABEAS CORPUS (no process) Fee status pd entered on 5/17/99 in the amount of $5.00 (Receipt No. 3301112) [3:99-cv-02257] (llm) [Entry date 05/21/91]
		* * * * *
5/28/99	2	ORDER TO SHOW CAUSE by Magistrate Judge Elizabeth D. Laporte: Respondents shall file a answer showing cause why a writ

DATE	DOCKET NUMBER	PROCEEDINGS
		of habeas corpus should not be issued no later than 6/16/99; hearing set for 10:30 7/8/99. Petitioner may file a traverse no later than 6/23/99. (cc: all counsel [3:99-cv-02257] (llm) [Entry date 06/02/99]
		* * * * *
6/2/99	3	CONSENT to proceed before magistrate judge by petitioner Hyung Joon Kim [3:99-cv-02257] (llm) [Entry date 06/03/99]
		* * * * *
6/10/99	4	DECLINATION to proceed before magistrate judge by Federal Respondents. [3:99-cv-02257] (llm) [Entry date 06/14/099]
		* * * * *
6/14/99	6	ORDER by Assignment Committee Case reassigned to Judge Susan Illston (Date Entered: 6/14/99) (cc: all counsel) [3:99-cv-02557] (llm) [Entry date 06/14/99]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
8/6/99	12	MEMORANDUM by Respondent to the Court regarding the transition period custody rules. [3:99-cv-02557] (cgd) [Entry date 8/10/99]
8/6/99	13	MINUTES: (C/R Judith Thomsen) (Hearing Date: 8/6/99): Petitioner's habeas corpus hearing – Held. Petition is taken under submission. Defendant shall inform the Court by the end of today, what, if any input INS has regarding the transitional rules. [3:99-cv-02557] (cgd) [Entry date 08/10/99]
		* * * * *
8/11/99	14	ORDER by Judge Susan Illston GRANTING Kim's habeas corpus petition [1-1] to the extent that Respondents shall promptly provide Kim with an individualized bond hearing, or otherwise as respondents may elect, to determine whether Kim is a flight risk or a danger to the community; terminating case; appeal filing ddl 10/12/99. To the extent that Kim seeks immediate release from

DATE	DOCKET NUMBER	PROCEEDINGS
		INS detention during the pendency of his deportation proceedings, Kim's petition is DENIED. (Date Entered: 8/13/99) (cc: all counsel) [3:99-cv-02257] (cgd) [Entry date 08/13/99]
10/12/99	15	NOTICE OF APPEAL by Respondents Thomas Schiltgen and Janet Reno from Dist. Court decision; Fee status waived [3:99-cv-02257] (bug) [Entry date 10/13/99]

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-17373

HYUNG JOON KIM,
PETITIONER-APPELLEE

v.

THOMAS SCHILTGEN; JANET RENO, ATTORNEY GENERAL RESPONDENTS-APPELLANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
11/10/99	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 10/22/99; appellee's designation of RT is due 11/1/99; appellant shall order transcript by 11/12/99; court reporter shall file transcript in DC by 12/13/99; certificate of record shall be filed by 12/20/99; appellant's opening brief is due 1/28/00; appellees' brief is due 2/28/00; appellants' reply brief is due 14 days from service of the appellee's brief [99-17373]

* * * * *

DATE	PROCEEDINGS
2/6/01	Filed order (Deputy Clerk: jc) directing the parties to be prepared to discuss at oral argument whether the appeal is moot. [99-17373] (jc)
2/12/01	ARGUED AND SUBMITTED TO Procter R. HUG, John T. NOONAN, William A. FLETCHER [99-17373] (sa)
	* * * * *
8/13/01	FILED CERTIFIED RECORD ON APPEAL: 1 CLER. S RECORD. (ORIGINAL) [99-17373] (sd)
	* * * * *
1/9/02	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Procter R. HUG; John T. NOONAN; William A. FLETCHER, author.) FILED AND ENTERED JUDGMENT. [99-17373] (tm)
	* * * * *
4/2/02	MANDATE ISSUED [99-17373] (tm)
	* * * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 99-2257

HYUNG JOON KIM, PETITIONER

v.

THOMAS SCHILTGEN, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANSICO, CALIFORNIA; AND JANET RENO, UNITED STATES ATTORNEY GENERAL, RESPONDENTS

[Filed: May 17, 1999]

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2241

Pursuant to FRCP 81(a), petitioner hereby petitions the court for a writ of habeas corpus. Petitioners states as follows:

A. Jurisdiction:

Petitioner Hyung Joon Kim (hereinafter referred to as "Kim") is imprisoned and deprived of his liberty at the Max Mead facility located at 17645 Industrial Farm Road, Bakersfield, California, in violation of the laws and the Constitution of the United States.

[2]

B. Intradistrict Assignment:

The location of factual events giving rise to this civil action is occurred in [*sic*] San Francisco County.

Therefore, this civil action is appropriately filed in the San Francisco Division of the United States District Court, Northern District of California.

C. Summary of Underlying Conviction:

1. Petitioner Hyung Joon Kim was convicted in Monterey County Superior Court for the offense of Petty Theft with Priors on October 8, 1997 (California Penal Code Section 666).

2. Sentencing Monterey County Superior Court Judge:

   The Honorable William D. Curtis

3. Scheduled Release Date:

   On or about February 1, 1999.

D. Summary of Concurrent and/or Previous Litigation:

Petitioner Kim is currently being held in custody at the Max Mead facility located in Bakersfield County pending deportation proceedings initiated by Notice to Appear dated December 16, 1998.

E. Statement of the Facts:

On October 8, 1997, Petitioner Kim was convicted of Petty Theft with Priors, and sentenced to prison with a release dated [*sic*] of February 1, 1999. On December 16, 1998, Petitioner Kim was served with a Notice to Appear alleging that Petitioner Kim was deportable as a consequence of his criminal conviction. Although Petitioner Kim's sentence was completed on February 1, 1999, the Immigration and Naturalization Service is holding him under mandatory detention provisions of Section 236(c) of the Immigration and Nationality Act,

8 USC § 1226(c), which Petitioner Kim [3] contends are violative of his due process. Under the mandatory detention provisions, a bail hearing cannot be granted Petitioner Kim.

F. Statement of Claims for Relief:

Petitioner seeks a declaration of this court that Section 236(c) of the Immigration and Naturalization Service [*sic*], 8 USC § 1226(c), is unconstitutional on its face as violative of procedural and substantive due process rights under the Fourth Amendment of the United States Constitution and for an order directing the District Director of the Immigration and Naturalization Service in San Francisco to conduct a bond hearing.

G. Exhaustion of Administrative Remedies:

Section 236(c) of the Immigration and Naturalization Act purports to create mandatory detention without a hearing on bond. Neither the Immigration Judge nor the Board of Immigration Appeals has the authority to consider constitutional challenges to Section 236(c). Consequently, Petitioner has exhausted his administrative remedies, and in any event, exhaustion of administrative remedies under these circumstances is not required.

H. Requested Relief:

Petitioner seeks a declaration of this court that Section 236(c) of the Immigration and Naturalization Service [*sic*] is unconstitutional on its face as violative of procedural and substantive due process rights under the Fourth Amendment of the United States Consitu-

tion and for an order directing the District Director of the Immigration and Naturalization Service in San Francisco to release Petitioner.

DATED this 13th day of May 1999.

/s/ ILLEGIBLE
Peter I. Hwang, Esq.
Attorney for Petitioner

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Custody Determination

File No.: A27 144 740
Date: August 18, 1999

KIM, Hyung Joon
(IN SERVICE CUSTODY)

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the immigration judge in your case, and in the event you are ordered removed from the United States, until you are taken into custody for removal, you shall be:

☐ detained in the custody of this Service.

☒ release under bond in the amount of $_5,000.00__

Custody determination made pursuant to district court order dated August 10, 1999, case number C-99-2257 SI.___

☐ released on your own recognizance.

☒ You may request a review of this determination by the Immigration Judge.

☐ You may not request a review of this determination by an immigration judge because the Immigration and

Nationality Act prohibits your release from custody.

/s/ ILLEGIBLE
(Signature of authorized officer)
V. Tony Marian

Assistant District Director for Deportation
(Title of Authorized Officer)

San Francisco, Ca.
(INS office location)

☐ I do ☐ do not request a redetermination of this custody decision by an immigration judge.

☐ I acknowledge receipt of this notification

(Signature of respondent) (Date)

RESULT OF CUSTODY REDETERMINATION

On _____, custody status/conditions for release were reconsidered by:

☐ Immigration Judge ☐ District Director
☐ Board of Immigration Appeals

The results of the redetermination/reconsideration are:

☐ No change - Original determination upheld.
☐ Detain in custody of this Service.
☐ Bond amount reset to $_____.
☐ Release - Order of Recognizance
☐ Release - Personal Recognizance
☐ Other: _____

(Signature of Officer)

U.S. Department of Justice
Immigration and Naturalization Service

SFR/DDP

425 I Street, N.W.
Washington, D.C. 20536

August 16, 1999

MEMORANDUM FOR FILE [5 U S C 552a(k)(2)]
[5 U S C 552(b)(7)(c)]

FROM: REDACTED
Deportation Officer

SUBJECT: Bond consideration for KIM, Hyung Joon
A27 144 740

Per conversation with ADD Tony Marian and District Counsel Ron Le Fevre, the file for the above-named alien was reviewed, pursuant to a district judge order. If the Transitional Period Custody Rules (TPCR) were still in effect, this alien would not be considered a threat, and release would be subject to flight risk consideration only. That being the case, bond would be set at $5,000.00.

DEPARTMENT OF JUSTICE
OFFICE OF THE INSPECTOR GENERAL
INSPECTION REPORT

IMMIGRATION AND NATURALIZATION SERVICE DEPORTATION OF ALIENS AFTER FINAL ORDERS HAVE BEEN ISSUED

March 1996
Report Number I-96-03

EXECUTIVE DIGEST

Current estimates of the population of illegal immigrants living in this country are around 4 million. These estimates do not include a more transient population of aliens who enter illegally for brief periods. The majority of the aliens the Immigration and Naturalization Service (INS) removes from the country are part of the transient population and are not included in the estimated 4 million illegal residents.

INS reported that in Fiscal Year (FY) 1994 it removed more than 1 million aliens who were in this country illegally. The great majority of these were Mexican nationals apprehended near the southern border who left the country voluntarily. These aliens are not part of the Detention and Deportation (D&D) program's workload and they are not considered to have been deported.

D&D's workload focuses on those illegal aliens who initially refuse to depart voluntarily. D&D reported that, at the end of FY 1994, 464,437 aliens were in some phase of the process for determining whether they should be allowed to remain in the United States, or they were in the process of being removed from the country.

Final orders for deportation are issued by the Executive Office for Immigration Review (EOIR). In FY 1994, EOIR issued 99,779 final orders and INS deported

Department of Justice
Office of the Inspector General
Inspections Division

47,434 aliens. Our inspection examined the actions taken by INS to remove aliens after EOIR had issued final deportation orders. Our May 1994 report titled Case Hearing Process in the EOIR, number I-93-03, examined the process leading to the issuance of final orders.

During the current inspection, we reviewed case files for a total of 1,058 aliens who were issued final orders at 14 locations to determine what actions INS had taken, including whether the alien had left the country as ordered.

We found INS removed almost 94 percent of the detained aliens in our sample. The aliens were deported in an average of 16 days after final orders were issued, even though problems in acquiring travel documents and limited escort and transportation resources caused delays in some cases. Detained aliens who were not deported included those of nationalities that could not be removed for political or humanitarian reasons, aliens for whom INS was unable to obtain travel documents, and aliens who had been granted administrative relief.

In contrast, only about 11 percent of the nondetained aliens in our sample left the country. Removing nondetained aliens depends largely on the voluntary surrender of the aliens when they are requested to do so. In the sample cases, D&D requested only 56 percent of the aliens to surrender. Reasons for failing to request surrender included the lack of a good address, political or humanitarian concerns raised by the alien's nationality, and the cost of [ii] removing the aliens. When surrender notices were sent, only a few aliens surrendered. When aliens failed to surrender, D&D often did not

have the resources to pursue them. When D&D reported the aliens who failed to surrender to INS Investigations, Investigations did not pursue them either, because these cases did not meet investigative priorities.

Delays by district counsel in transmitting final orders to D&D and delays by D&D in taking action may have contributed to the low percentage of nondetained aliens who were deported. Special conditions affecting certain nationalities also impaired INS' ability to remove aliens.

D&D managers in several locations expressed frustration over their inability to remove aliens in accordance with immigration laws. They attributed this inability in part to limits on personnel, funding, detention space, and related resources, and in part to the effects of political conditions. Managers confirmed that in deciding which aliens to detain, they tended to choose those who could be deported with expenditure of the fewest resources.

Although resources are a real constraint, detention is key to deportation. INS clearly could improve the effectiveness of the deportation program if more aliens could be detained. Resources permitting, INS should take more aggressive actions to remove nondetained aliens, such as taking aliens into custody at hearings when a final order is issued at the hearing; delivering surrender notices personally instead of mailing them to aliens; moving more quickly to present surrender notices; and pursuing aliens who fail to surrender.

TABLE OF CONTENTS

	Page
INTRODUCTION	[20]
BACKGROUND	[21]
Legislative Basis for Detention and Deportation	[21]
Program Responsibilities	[21]
Proceedings and Final Orders	[21]
Exclusion, Deportation, and Voluntary Departure	[22]
Exclusion	[23]
Deportation	[23]
Voluntary Departure	[23]
Aliens Apprehended and Expelled	[23]
RESULTS OF THE INSPECTION	[26]
REMOVAL OF DETAINED ALIENS	[26]
Travel Documents	[29]
Lack of Detention and Transportation Resources	[30]
REMOVAL OF NONDETAINED ALIENS	[32]
Delays in Receipt of Final Orders and in D&D Initial Actions	[32]
Routing of Final Orders	[35]
D&D Initial Actions	[36]
Failure to Send Surrender Requests	[37]
Failure of Nondetained Aliens to Surrender	[38]
Failure to Pursue Abscondees	[40]

		Page
	Failure to Investigate Abscondees	[42]
	Closing Abscondee Cases	[43]
	Special Conditions Affecting Certain Nationalities	[43]
CONCLUSIONS		[45]
RECOMMENDATONS		[47]
APPENDIX I	Abbreviations	[49]
APPENDIX II	Management's Response to Draft Report	[50]
APPENDIX III	Office of the Inspector General's Analysis of Management's Response	[62]

[1] INTRODUCTION

We have completed an assessment of whether Immigration and Naturalization Services (INS) removes deportable aliens promptly from the United States after the issuance of final deportation orders.

Our focus was on INS processes and actions. We conducted field work at INS Headquarters, nine district offices and six detention centers. Because immigration judges or the Board of Immigration Appeals in the Executive Office for Immigration Review (EOIR) issue the final orders, we also interviewed officials at EOIR.

We reviewed applicable laws, regulations, policy, and written procedures relating to the removal of aliens from the United States. We interviewed appropriate personnel at all locations visited and also examined various kinds of relevant documents at each location.

We selected field locations that included three of the largest INS districts; large and small districts with dention facilities; smaller districts without an INS or contract detention facility; and a Bureau of Prisons facility for criminal aliens. These locations included district offices in Baltimore, MD; Denver, CO; Los Angeles, CA; Miami, FL; New Orleans, LA; New York, NY; San Francisco, CA; Seattle, WA; and Washington, DC; and detention centers in Denver, Krome, FL; Oakdale, LA; Seattle; Terminal Island, CA; and Varick Street, NY.

At each location visited, we reviewed a random sample of case files relating to aliens who had been issued final orders by EOIR. We reviewed a total of 1,058 case files. The files were selected from EOIR's data base by means of a computerized random number generator.

Cases involving nondetained aliens were randomly selected from final orders issued in the period April 1993 through September 1993, and cases involving detained aliens were from the period January 1994 through July 1994.

BACKGROUND

Legislative Basis for Detention and Deportation

The Immigration and Nationality Act (Act) provides statutory authority for determining whether aliens may enter or remain in the United States, and for removing aliens who violate immigration law. INS has the authority to detain any alien who does not clearly appear to be admissible on arrival, and to arrest and detain any individual suspected of being in the United States illegally.

Program Responsibilities

Within INS, the Detention and Deportation (D&D) program's responsibilities are the detention, exclusion, removal, parole, and deportation of aliens. D&D's goal is to ensure that deportable or excludable alien cases are processed [2] expeditiously, and that the aliens are removed from the country promptly.

Proceedings and Final Orders

The Act establishes proceedings, conducted by immigration judges, to determine whether an alien should

be allowed to enter or be deported. During the proceedings, aliens may be held in custody, released on bond, or released on parole.

The Act gives certain rights of appeal from an adverse decision by an immigration judge. The alien is allowed to file an appeal with the Board of Immigration Appeals (BIA). If they receive an adverse decision from the BIA, aliens may petition Federal district or appellate courts for judicial review of final deportation orders.

An order of deportation becomes final and the alien subject to removal by INS when:

- an immigration judge enters an order of deportation without granting voluntary departure or other relief, and the alien waives the right to appeal; or
- the BIA enters an order of deportation on appeal, without granting voluntary departure or other relief.

If an alien petitions a Federal court for review, the order becomes final if and when the court affirms the order of deportation. As used in this report, final orders are those issued by immigration judges, BIA, and Federal courts that were not appealed to a higher level. If voluntary departure was granted as part of the order, we considered the order to be final when the time for voluntary departure expired. In some cases we reviewed, decisions from Federal courts were pending.

Exclusion, Deportation, and Voluntary Departure

In processing aliens who are in this country illegally, the Act distinguishes between those who require

formal proceedings resulting in final orders before removal and those who depart voluntarily.

Exclusion—The Act provides for inspection of aliens at port of entry, and requires aliens who do not appear clearly entitled to enter to be detained for further inquiry. If, upon further inquiry, the alien is not permitted to enter the country, the alien is excluded.

Funds used to pay for the cost of care and transportation of excluded aliens are derived from user fees that are collected from transportation companies and passed on to international travelers as an addition to the cost of their tickets.

Deportation—Aliens may be deportable in three circumstances: (1) if they enter the United States illegally; (2) they enter legally but violate a condition of entry; or (3) they are convicted of certain crimes. Unless stated otherwise, as used in [3] this report the term "deportation" includes both deportations and exclusions.

Voluntary Departure—Aliens who admit deportability may be permitted to depart voluntarily or they may voluntarily accept removal by the government under safeguards. These aliens may not require deportation proceedings and they are not considered to have been deported.

Aliens Apprehended and Expelled

The total number of aliens in the United States illegally is unknown. INS and the Urban Institute, a nonprofit policy research organization, estimate that the population of illegal immigrants living in the country is approximately 4 million. These estimates do not include a more transient population of aliens who enter

illegally for brief periods. The majority of the aliens INS removes from the country are part of the transient population and are not included in the estimated 4 million illegal residents.

INS reported that, in Fiscal Year (FY) 1994, it apprehended 1,094,643 aliens, and expelled 1,077,896 aliens. Of the aliens INS expelled, 1,031,668 were apprehended by the Border Patrol. The great majority consisted of Mexican nationals apprehended near the southern border. Border Patrol agents processed these aliens for removal, and most of them left the country under voluntary conditions without EOIR proceedings. These aliens are not part of D&D's deportation workload.

In FY 1994, according to INS reports, 1,030,462 illegal aliens departed voluntarily, 40,905 were deported, and 6,529 were excluded from the country.

D&D's workload focuses on those illegal aliens who initially refuse or are unable to depart voluntarily. D&D reported 464,437 aliens under "docket control" at the end of FY 1994. "Docket control" means that these aliens were in some phase of the process for determining whether they should be allowed to remain in the United States, a process generally including EOIR proceedings, or they had been found deportable and their departure was pending.

In FY 1994, EOIR issued 99,779 final orders and INS deported 47,434 aliens. About 45 percent of the final orders were issued to detained aliens. Of the 54,779 final orders for nondetained aliens, 47 percent were issued in absentia when the aliens failed to appear at hearings.

Our May 1994 report titled Case Hearing Process in the EOIR, number I-93-03, examined the process leading to the issuance of final orders. This current review was limited to actions taken by INS to remove aliens after EOIR had issued final orders.

[4] RESULTS OF THE INSPECTION

REMOVAL OF DETAINED ALIENS

INS removed most detained aliens promptly after final orders were issued. In our sample, we found that INS successfully deported almost 94 percent of the detained aliens, with an average deportation time of 16 days. Problems with acquisition of travel documents and limited resources to escort and transport detained aliens sometimes affected their deportation.

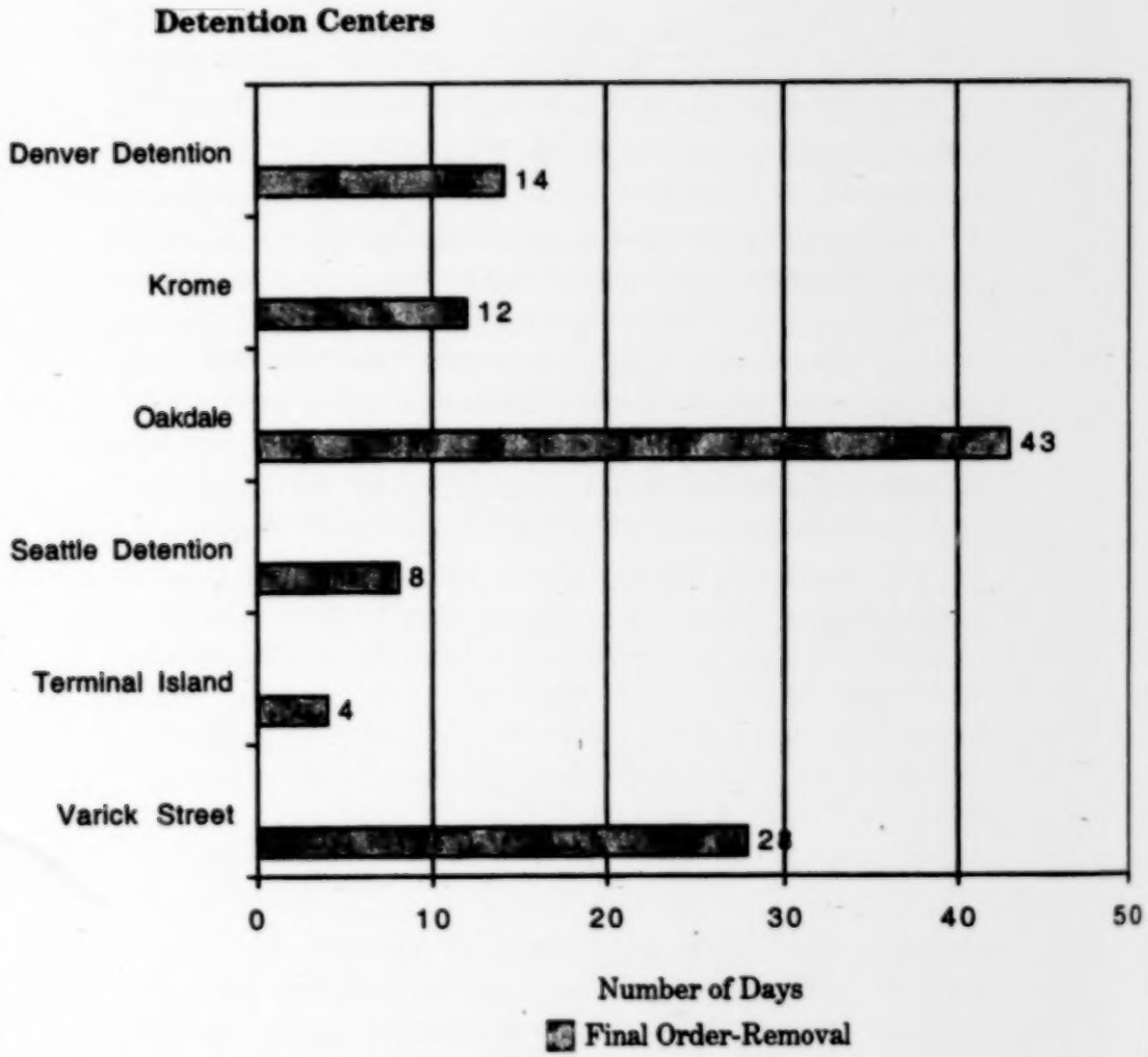
We reviewed 402 detained alien case files. INS deported 376, or almost 94 percent of the aliens. The 26 aliens not deported included 13 of nationalities that could not be deported for political or humanitarian reasons, 4 for whom INS was unable to obtain travel documents, 2 pending travel arrangements, 2 who had been granted administrative relief, 2 who had been released on bond and then absconded, 1 with a Federal appeal pending, 1 pending prosecution for illegal entry after a previous deportation, and 1 who had been indicted for murder and turned over to the local police department.

INS detains aliens according to priorities, funding sources, and facility and resource limitations. As required by law, aliens convicted of aggravated felonies are the first priority, followed by other aliens convicted of criminal behavior, with administrative deportation cases given the lowest priority. District officials confirmed that aliens who could be deported easily were more likely to be detained, to make the most effective

use of INS detention space. The availability of User Fee funds to cover detention costs also affects which aliens INS can detain. User Fees may allow INS offices to detain aliens in exclusion proceedings, when funds are unavailable for other deportation cases.

Since INS controls the alien in detention, removal procedures primarily involve making appropriate travel arrangements. These procedures include obtaining travel documents, making specific transportation arrangements, and escorting the aliens to the transportation carrier. Our review of processing time from issuance of final order to the date the alien left the country showed an average removal time of 16 days.

The following shows the average removal time at each of the six detention centers:



[5]

At Varick Street, problems in obtaining travel documents for the aliens caused the relatively long time before removal. At Oakdale, problems both with travel documents and transportation resources caused delays. The short average time before removal at Terminal Island was due to a high percentage of Mexicans, who do not need travel documents to return to Mexico.

Travel Documents

Generally, INS cannot deport aliens to countries that have no diplomatic relations with the United States. For example, D&D has been unable to deport Vietnamese nationals because there has been no means of obtaining travel documents for them.

In addition, D&D personnel at all locations cited difficulties or delays in obtaining travel documents for nationals of some other countries, including Jamaica, the People's Republic of China (PRC), Nigeria, and India. District managers commented that most of the Jamaicans who are deported are criminal aliens, and Jamaican authorities are reluctant to take them back. D&D officers said obtaining documents for nationals of India and the PRC took a long time because authorities in those countries require a check of records in local provinces before issuing travel documents.

On the day of our visit to the Varick Street facility, we found that:

- One Jamaican had been waiting 55 days and another 40 days for travel documents. According to the D&D staff, the Jamaican consul regularly waited for a group of five Jamaicans with final orders before issuing travel documents.

- One PRC national had been detained for 201 days after receiving a final order.

Two Headquarters D&D officers have been assigned to help districts obtain travel documents in problem cases. The officers attempt to build goodwill through contacts with embassy officials and Department of State desk officers, who may be able to assist INS in obtaining documents. For the period from March 1994 through March 1995, 174 cases were referred to Headquarters for assistance. As of May 10, 1995, a travel document was issued and the alien was deported in 91 (52 percent) of the cases. Jamaicans nationals were the largest group for whom assistance was requested, with documents issued in 26 of 33 referrals. On the other hand, INS was unable to acquire documents in any of the 13 Vietnamese cases referred.

Lack of Detention and Transportation Resources

Districts reported periods when they were unable to deport due to lack of detention and transportation funds. In one district, D&D was able to locate non-detained aliens but not deport them, because removal regularly required 3 detention days and the cost of the ticket.

In some locations limits on the number of staff and lack of transportation [6] needed to deliver detained aliens to airports or escort them on foreign flights delayed their removal. This was especially evident at the Bureau of Prisons' facility in Oakdale. Alien criminals in the Bureau of Prisons' system are sent to the Oakdale facility from all over the country. District D&Ds throughout the country also transfer criminal aliens to Oakdale. Upon issuance of a final order, Oakdale D&D employees deport the aliens.

Oakdale is located in a remote area of Louisiana. The closest international airports are in Houston and New Orleans. Both involve a drive of over 3 hours. Further limitations are imposed by commercial airlines' restrictions on the number of seats available for deporting aliens on certain flights. The INS Air Operations, located in nearby Pineville, has service aircraft to transport aliens to Miami for connecting flights, but because of mechanical downtime or the other missions the aircraft are not always available for Oakdale use.

All aliens detained at Oakdale are criminals and many require D&D escorts back to their country of origin. At the time of our visit, there were 26 detention officers rotating escort duty, usually on an overtime basis. D&D travel clerks reported shortage of personnel to perform escort duties. Additionally, they said government ground transportation used to transport aliens to Houston, New Orleans, and Miami frequently broke down.

Based on our case review, we noted that Oakdale took the longest to remove detained aliens. The Oakdale average was 43 days from the date of the final order to the date of removal.

Generally, Oakdale D&D procedures for preparing detained aliens for removal were impressive. Preliminary paperwork was prepared before the alien received a final removal order and the case was ready to go. Yet limited resources caused delays in removing detained aliens from Oakdale. Longer use of detention space per alien ultimately increases detention costs and reduces the space available for detaining additional aliens.

REMOVAL OF NONDETAINED ALIENS

INS was successful in deporting only about 11 percent of nondetained aliens after final orders had been issued. Contributing to this low percentage were delays by district counsel in transmitting final orders to D&D, delays by D&D in taking action, failure to send surrender notices to aliens, failure of aliens to surrender in response to the notices, and limited efforts made by INS to pursue aliens who failed to surrender. Special conditions affecting certain nationalities also impaired INS' ability to remove aliens.

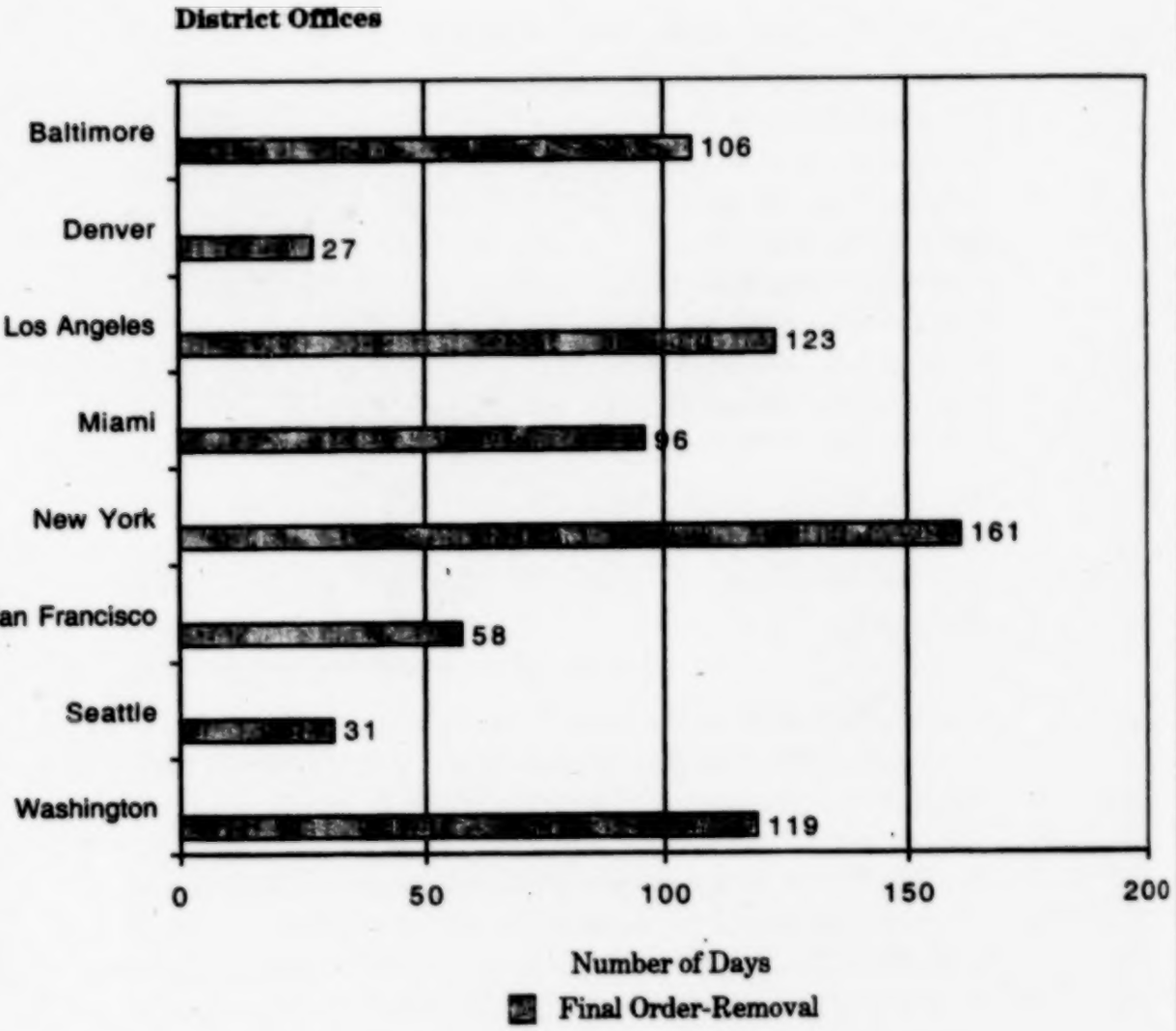
We reviewed 656 case files for aliens who were not detained when final deportation orders were issued to them. Of the 656, only 72 aliens (11 percent) left the country; 45 were formally deported and 27 others left the country on their own accord.

[7] Deportation of nondetained aliens relies largely on aliens voluntarily surrendering when INS requests them to do so. Analysis of the 656 cases in our sample showed that D&D only requested the surrender of the aliens in 372 cases. In many other cases, D&D did not have the aliens' current addresses, or the aliens were of nationalities affected by political or humanitarian concerns. When surrender notices were sent, only 40 aliens surrendered. When aliens failed to surrender, D&D often did not pursue them. When D&D reported these aliens to INS Investigations, Investigations generally did not pursue them.

Delays in Receipt of Final Orders and in D&D Initial Actions

We found D&D received some final orders from the district counsel long after they were issued. We also found that sometimes D&D did not take initial action

until long after final orders were received. In our review of the 656 sample cases for nondetained aliens, we examined each file to determine the processing times for actions after final orders were issued by EOIR. We treated as initial action any evidence of review of the case by D&D. Initial actions could be notes made by reviewing officers, clerical instruction sheets, typed forms such as warrants of deportation in the file, or other entries. The average number of days from issuance of final orders to the first action recorded by D&D in the sample case files were as follows:



Routing of Final Orders—

Final orders are provided to the INS district counsel by EOIR. D&D cannot initiate actions to remove the alien until the district counsel's office forwards the final order to D&D.

We interviewed district or assistant district counsel at seven of the locations visited. In six districts the counsel said they received final orders from immigration judges promptly, most of them on the day of the hearing. One distict reported having problems in getting copies of final orders from immigration judges.

BIA decisions are mailed directly from Falls Church, Virginia, to the district counsel controlling the case file. District counsel said as a rule they received copies of BIA decisions within a few days after the decisions were rendered.

Trial attorneys assigned to each district counsel's office maintain control of case files during the EOIR proceedings. District counsel told us there were no set guidelines for routing final orders. During our review, we observed procedures established by the district counsel to route final orders to D&D after allowing for an [8] appeal period. In general, upon learning of a decision, the trial attorneys: (1) route the case file and the decision to D&D to act, if both the alien and INS waived appeal; (2) hold the file until allotted for appeal expires, if the alien or INS reserved appeal; (3) hold the file if a final order was issued in absentia, in case the alien appears and files a motion to reopen proceedings.

In 448 of the 656 nondetained sample cases, we could not tell how long district counsel kept the final orders before routing them to D&D. In only 208 of the cases were we able to determine the times because district

counsel forwarded[ ] the final orders to D&D with transmittal memos or other notations.

We found that only 55 of the 208 cases had been forwarded to D&D in a timely way. We used as criteria for timeliness 15 days for final orders issued by immigration judges (allowing for appeal and routing) and 10 days for BIA final orders (allowing for mail). Over 90 days elapsed before 53 of the cases were routed to D&D, and 24 of those took more than 180 days.

We also found that for 29 of the cases, or 4 percent of our sample, D&D had not received the final order and the case file held no record of its issuance.

D&D Initial Actions—After D&D receives a final order, generally an officer reviews the case and instructs a clerk to prepare the required documents. These include a warrant of deportation for issue by the district director and two forms to mail to a nondetained alien. The first form states the alien has been ordered deported to a specified country and warns of penalties for unauthorized reentry. The second form instructs the alien to surrender by reporting to the local district office with baggage on a specified date and time.

District D&D staff cited detained aliens and aliens released on bond as their priority cases. Other nondetained cases were worked as time allowed. In New York, which had the longest times from issuance of final orders until initial action, deportation officers were frequently detailed from the District Office to Varick Street to assist with detained aliens.

Failure to Send Surrender Requests

The surrender request is an integral part of the removal process, because it establishes a date for the alien to appear for deportation.

We found that district D&Ds failed to request surrender in 36 percent of our sample cases (237 cases). An additional 7 percent of the cases (47 cases) required no surrender notice for administrative reasons, such as pending federal court review, status adjustment based on marriage pending with the district examinations section, or because the alien had already left the country.

Some surrender requests were not sent because D&D had not received the final orders (29 cases), D&D did not have good addresses for the aliens (106 cases), the aliens were of nationalities handled under special conditions (73 cases), and other reasons such as a lack of detention or travel funds. For example:

[9]

- New York did not request surrender in 66 out of the 107 cases reviewed. The majority of the aliens failed to appear at EOIR hearings and D&D did not have good addresses.

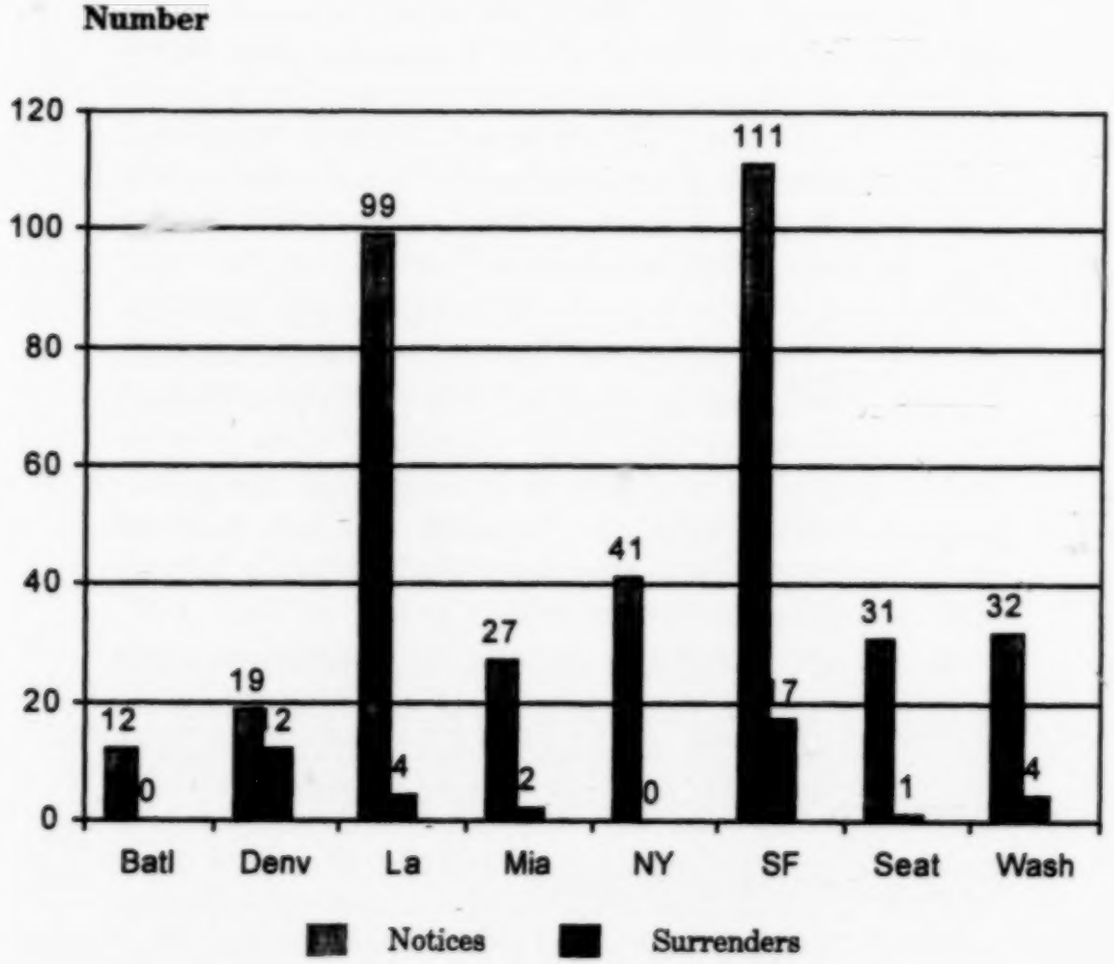
- In Miami, certain nationalities (Cuban, Nicaraguans, and Haitians) were not processed for removal. This accounted for 58 out of 110 cases reviewed having no evidence of a surrender request.

- Washington did not request surrender in 45 of 89 cases reviewed. A D&D officer commented that frequently surrender request were not mailed out

because there were no funds available to detain or deport the aliens if they surrendered.

Failure of Nondetained Aliens to Surrender

Few aliens report to the district offices after receiving the surrender notices. D&D officers throughout the country refer to the notices as the "run letter." Most aliens who receive the notices either ignore them or move away with no forwarding address. Based on our case review, only 40 aliens surrendered in response to the 372 surrender notices. The following number of aliens surrendered in response to surrender notices sent out at each district:



As reflected in the above chart, our sample found that New York D&D sent out 41 notices to nondetained aliens to surrender for removal. No one surrendered. Miami D&D sent out 27 notices and 2 aliens surrender; but one was pending adjustment of status and the other was a Cuban placed on an order of supervision. Therefore, neither was removed or detained.

In addition to our sample, New York D&D had compiled data on the number of surrender notices mailed to nondetained aliens between October 1993 and August 1994. D&D found that 3,025 surrender notices were mailed and only 74 aliens, or 2 percent, actually surrendered. Only 48 of the 74 alens who surrendered were removed. The remaining 26 aliens were not removed pending further actions.

The same type of data was compiled by Miami D&D during FY 1993, when Miami scheduled 1,340 aliens for surrender. Only 75, or 6 percent, actually did so and 68 of the 75 aliens who surrendered were removed.
[10]

Failure to Pursue Abscondees

Nondetained aliens who do not comply with a surrender request are rarely pursued actively. Within INS, aliens who failed to appear for proceedings or for deportation after issuance of final orders are called "abscondees". District D&D personnel may be assigned to try to locate abscondees. In a program referred to as Bag and Baggage, officers in D&D sections search for aliens who have failed to appear. Since these aliens have final deportation orders, the D&D officers can pick up any aliens they locate, detain them briefly, and deport them. Each district makes a determination on whether to use their resources to perform the searches.

Seven of the nine district offices we visited had Bag and Baggage programs. New York and Washington did not, due to lack of resources. Baltimore D&D squads conducted weekly searches and reported locating 62 aliens from July 1993 to June 1994. Los Angeles conducted the searches, but one D&D supervisor noted that they are time-consuming and often take needed personnel away from the office for several hours. The Bag and Baggage program was popular with most officers who participated in it, and D&D managers agreed that it improved the officers' morale.

Bag and Baggage searches located a relatively small number of aliens. For example, Los Angeles reported that 22 aliens were located from January through June 1994. Due to limited staff resources, the Bag and Baggage programs usually target criminal aliens who have failed to surrender. The scope of these programs is additionally limited by resources, focusing on certain nationalities that require little or no effort to obtain travel documents and minimal costs to remove. If there is no known last home or work address for the alien, searches are frequently not practical, according to the D&D officers. Other than a Bag and Baggage program, district D&Ds do not actively pursue aliens with final removal orders.

Some districts used credit bureau and state motor vehicle data systems to search for nondetained aliens. The District Director in Miami, along with D&D managers elsewhere, noted that access to nationwide motor vehicle and credit bureau data bases, as well as access to Social Security data, would help to locate aliens.

Failure to Investigate Abscondees

On both a national and district level, INS Investigations has given D&D abscondee cases low priority. Headquarters and district managers said it has been national policy for Investigations not to work abscondee cases, unless an abscondee comes to their attention as part of a broader investigation. D&D cases are given low priority because of the shortage of investigative resources and because other investigations have a higher priority.

During our field visits, we noted that:

- In New York, if aliens fail to appear for their hearings or fail to respond to the surrender notice, D&D routes the file to district Investigations [11] with a memo requesting Investigations to locate the alien.

- Investigations will add another memo to the file, noting receipt but stating the case will not be accepted. New York D&D mangers told us that while abscondee cases continued to be referred routinely, Investigations had not accepted a D&D case for several years.

- In Baltimore, the D&D staff told us they do not refer cases to Investigations because it is time-consuming and pointless. An Investigations manager confirmed that under current priorities Investigations did not work D&D abscondee cases.

Closing Abscondee Cases

If aliens were not located, district D&Ds closed the abscondee cases, using a schedule adapted from a Headquarters policy memo issued in August 1982. Specifically, the memo instructed field offices converting from the manual docket control system to the automated Deportable Alien Control System (DACS) not to enter certain inactive cases into DACS. These included cases where INS had no contact for a year or more with aliens who failed to appear for proceedings; aliens with criminal backgrounds who failed to surrender for deportation within 5 or more years of the last contact; and noncriminal aliens who failed to surrender for deportation after 3 or more years of no contact. District D&Ds used these time frames as criteria for closing inactive cases in DACS in an effort to weed out cases likely to prove unproductive.

After closing cases in DACS, district D&Ds no longer maintain the record or track the case. Unless one of these aliens somehow comes to INS's attention, it is unlikely the final removal order will ever be executed.

Special Conditions Affecting Certain Nationalities

Removal of aliens to certain countries may be delayed or prevented altogether by special conditions relating to those countries.

The Act outlines conditions under which the Attorney General (AG) may, on humanitarian grounds, designate for temporary protection nationals of countries undergoing an extraordinary temporary event. Such events include ongoing armed conflict or a natural disaster threatening the aliens' personal safety if they were required to return to their countries. Temporary protected status (TPS) may be granted to eligible aliens

for a specified period and aliens under TPS cannot be removed.

Other national groups not designated for TPS have been given special handling from time to time out of humanitarian concerns. For these groups, including most notably Nicaraguans and PRC nationals in recent years, a special review required after the issuance of final orders may interrupt the deportation process.

Officials in a number of the districts we visited stressed the influence of the [12] political climate on internal policies and the effects on D&D's work. For example, under a longstanding Department of Justice policy, D&D was required to submit files for Nicaraguans with final orders for further review before deporting them. This procedure was started in January 1987 and continued, with modifications, until December 1993. The review was conducted by the Office of the Deputy AG (DAG) and initially required the complete INS file to be forwarded. The Office of the DAG review resulted in a recommendation to the AG who reviewed each case before notifying INS to deport or not deport the person.

D&D field officials described the review process as extremely slow, and in many cases they received no response. In Baltimore, D&D officers said their experience of the Nicaraguan review procedure was that it took 2- to 3-years after files were forwarded through INS Headquarters to the DAG/AG to decide whether an alien could be deported.

District managers and D&D officials in several districts discussed the special conditions and review procedures from their perspective of being responsible for field operations. The special procedures often

created large populations of aliens, many of whom remained in the country for years outside normal immigration controls.

The procedures tended to continue as field practice, through inertia and the lack of a coherent policy, potentially long after the conditions giving rise to them changed significantly.

Another example of special procedures involves PRC nationals. District counsel told us they began implementing procedures in August 1994 for processing PRC nationals who present claims for relief from deportation based on enforced family planning practices. District counsel noted that the proceedings frequently use up considerable staff resources and time.

In some districts, the special conditions account for many of the aliens D&D has not attempted to remove. For example, in Miami the Nicaraguan population (over 19,000) contributes to the disproportionate number of cases pending execution of final orders. Miami also has large Cuban and Haitian populations, two major national groups INS has been unable to deport. In our Miami sample, of 107 aliens with final orders pending execution, 70 percent belonged to these three national groups: 31 aliens were Nicaraguan, 25 were Haitians, and 19 were Cuban. The Miami docket also included Guatemalans and El Salvadorans who qualified for TPS.

CONCLUSIONS

Based on the overall data, INS only removes about half the aliens who have been issued final deportation orders. EOIR issued 99,799 removal orders in FY 1994 and INS deported 47,434 aliens; 45,000 of the removal orders were for detained aliens and 54,799 were for nondetained aliens. Based on the results of our sample

of 1,058 cases, it is clear that most of the aliens actually deported were detained, and few of the nondetained aliens were deported. Detention is key to effective deportation.

[13]

Efficient use of detention resources affects the number of aliens INS can deport. The sooner INS turns cases over, the sooner the detention space can be reused. Each additional day of detention after the issuance of a final removal order prevents turnover of the limited bedspace to allow detention of additional aliens. Our review showed that, on the whole, INS was doing a good job of removing detained aliens.

At all points in the process of enforcing immigration laws, INS managers necessarily exercise their discretion–in determining which aliens to bring into proceeding, which aliens to detain, and which aliens to pursue if they abscond. These determinations are based on a number of considerations, including INS priorities and available resources. Once an alien is detained, the case is given priority in EOIR proceedings and D&D tracks the case and tries to move it along. Nondetained cases also are treated according to priorities. Limited D&D resources are used to search for a few aliens, most of them criminals, who have absconded after receiving final orders. If INS has no address and is unable to locate abscondees, after a period of time the cases are closed.

Limits imposed by personnel, funding, detention space, and related resources affected how soon, and how many aliens were removed. District managers and D&D officers in several locations expressed frustration over their inability to remove aliens with final orders.

They attributed this inability in part to the workload and the resources for handling it and to humanitarian and political conditions and pressures interfering with carrying out immigration laws. District officials noted that in making choices about whom to detain, they tended to detain the aliens who can be removed most easily.

Too many factors affect the removal of aliens to identify an exact correlation between delays in taking actions and the deportation rate. However, it seems logical that the sooner INS tries to locate the aliens, the better the chance is that INS will be able to deport them.

Although resources impose real constraints, INS could improve the effectiveness of deportations by detaining more aliens who are undergoing proceedings.

INS could also improve the effectiveness of deportations by changing its current removal procedures for nondetained aliens. Of the final orders for nondetained aliens, while 25,976 were issued in absentia, in 28,803 cases final deportation orders were issued to aliens who were present at the hearings. INS should consider taking aliens into custody at the hearings when the final orders are issued at the hearings. INS should also consider personal delivery of surrender notices to aliens and taking them into custody at that time, rather than mailing the surrender notices to the aliens.

RECOMMENDATIONS

Since detention is key to deportation, INS needs to increase detention or develop a better strategy for [14] nondetained aliens. In the interim, we recommend that INS take more aggressive actions to remove nondetained aliens, such as:

— moving more quickly to present surrender notices to aliens after receiving final orders;

— delivering surrender notices instead of mailing them to aliens;

— taking aliens into custody at hearings when final orders are issued at hearings;

— pursuing aliens who fail to appear and reviewing procedures for closing cases for aliens who fail to appear;

— coordinating with other governmental agencies to make use of all data bases available for tracking aliens who fail to appear.

APPENDIX I

ABBREVIATIONS

Act	Immigration and Nationality Act
AG	Attorney General
BIA	Board of Immigration Appeals
DACS	Deportable Alien Control System
DAG	Deputy Attorney General
D&D	Detention and Deportation
EOIR	Executive Office for Immigration Review
FY	Fiscal Year
INS	Immigration and Naturalization Service
PRC	People's Republic of China
TPS	Temporary Protected Status

Memorandum APPENDIX II

[Seal Omitted]

Subject	Date
DRAFT INSPECTION REPORT: Immigration and Naturalization Service Deportation of Aliens After Final Orders Have Been Issued; Report I-94-08	JAN 22 1996

To Mary W. Demory
Acting Assistant Inspector
General for Inspection
Department of Justice

From Office of the
Commissioner
Immigration
and
Naturalization
Service

Attached is the response from the Executive Associate Commissioner for Programs addressing your memorandum dated August 30, 1995. I have reviewed the response and concur with the comments.

We have partially concurred with the finding related to removal of non-detained aliens. Specifically, we note confusion as to the definition of "final orders." The report suggests that you consider it to be an order issued by the Executive Office of Immigration Review. There are several situations where an Immigration Judge issues a final order that is not executable. The Executive Associate Commissioner for Programs has discussed this in detail on pages 1 and 2 of the attached response.

We have also partially concurred with recommendations 2, 3, and 4. Although we agree that we should

take more aggressive actions to remove non-detained aliens, legal and resource constraints factor into full implementation of these recommendations. These constraints are discussed on pages 2 - 5 of the Executive Associate Commissioner for Programs' response. My staff is pursuing solutions to these constraints, and I believe the deportation rate will improve as appropriate changes occur.

If you have any questions, please contact Kathleen Stanley, Audit Liaison, at (202) 514-8800.

/s/ CHRIS SALE FOR
DORIS MEISSNER
Commissioner

Attachment

cc: Vickie Sloan, DOJ Audit Liaison

Memorandum

APPENDIX II

[Seal Omitted]

Subject	Date
DRAFT INSPECTION REPORT: Immigration and Naturalization Service Deportation of Aliens After Final Orders Have Been Issued; Report I-94-08	DEC 26 1995

To Doris Meissner
Commissioner

From Office of
Programs
(HQPGM)

FINDING 1 (page 5):

REMOVAL OF DETAINED ALIENS

INS removed most detained aliens promptly after final orders were issued. In our sample, we found that INS successfully deported almost 94 percent of the detained aliens, with an average deportation time of 16 days. Problems with acquisition of travel documents and limited resources to escort and transport detained aliens sometimes affected their deportation.

INS POSITION: Concur.

FINDING 2 (page 8):

REMOVAL OF NON-DETAINED ALIENS

INS was successful in deporting only about 11 percent of non-detained aliens after final orders had been issued. Contributing to this low percentage were delays by district counsel in transmitting final orders to D&D, delays by D&D in taking action, failure to send

surrender notices to aliens, failure of aliens to surrender in response to the notices, and limited efforts made by INS to pursue aliens who failed to surrender. Special conditions affecting certain nationalities also impaired INS' ability to remove aliens.

INS POSITION: Concur in Part.

The OIG report identified delays in the transmission and execution of "final orders." The report defines final orders as "those issued by EOIR." Report, at 2. It is not clear what is meant by this definition. Under the regulations, an immigration judge's (IJ) order of deportation, *including an alternate order of deportation coupled with an order of voluntary departure*, becomes final "upon dismissal of an appeal by the Board of Immigration Appeals (BIA), upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken." 8 C.F.R. § 243.1 (emphasis added). Furthermore, a BIA order is final "as of the date of the Board's decision." *Id.*

[2]

However, simply because and order is final does not mean that it is subject to execution. In particular, an IJ or BIA alternate order of deportation coupled with an order of voluntary departure, is not subject to execution until after the period for voluntary departure has expired. 8 C.F.R. § 243.3(a)(1). The period granted for volutary departure is frequently between 30 to 90 days. During this period, an order of deportation that may be final pursuant to 8 C.F.R. § 243.1 cannot be executed. Such an order can be executed only subsequent to the expiration of the authorized period of voluntary departure. While the OIG Report allowed for appeal and routing (of IJ decisions) and mailing (for BIA decisions) in determining timeliness of transmittal of final orders

to D&D and of subsequent D&D action, the Report did not take into account the existence of deportation orders coupled with orders granting voluntary departure. Because such deportation orders cannot be executed during the voluntary departure period, the timing of transmittal to D&D and of D&D action can be affected.

Also in cases where an alien reserves the right to appeal, it is often difficult and time-consuming for district counsel offices to determine whether a notice of appeal in fact has been filed with the Office of the Immigration Judge. If the INS is not served with the notice, district counsel offices often must attempt to verify whether the IJ office received the notice of appeal. Time-consuming searches and transmittal delays also arise in cases where the IJ decision is not issued at the conclusion of the hearing.

Furthermore, petitions for review filed in federal court can also require resource-intensive tracking and engender delays. In cases where judicial review of the deportation order is sought, the order is subject to execution only after "[a] federal district or appellate court affirms [the order] in a petition for review or habeas corpus action." 8 C.F.R. § 243.3(a)(4).

RECOMMENDATION 1 (page 18): We recommend that INS take more aggressive actions to remove non-detained aliens, such as: moving more quickly to present surrender notices to aliens after receiving final orders.

INS RESPONSE: Concur. The INS has been concerned for some time about the problems of removing non-detained aliens with final orders of deportation. The INS is currently working with the EOIR to establish an

EOIR data interface that will inform the INS when a final order of deportation has been entered. The INS will continue to collaborate with EOIR so that an effective notification system regarding final orders of deportation can be implemented.

In July 1995, INS through the National Institute of Justice, commissioned a project to be undertaken by the Vera Institute of Justice. The goal of the project is for Vera to design, implement, and assess a demonstration program that will increase the effectiveness and efficiency of adjudication, release, reporting, and removal of non-detained illegal aliens.
[3]
The first phase of the two phase project, delivery of a draft program plan, is scheduled for completion by October 31. The plan should be revised, refined and final by December 31. Phase two, the implementation of the plan at several test sites, will begin implementation in January 1996. The completion date depends on the specific structure of the plan and so is not available at this writing. However, it is anticipated that the test of the plan will take at least 12 months. The INS is hopeful that Vera may develop some innovative strategies to increase the rate of appearance by non-detained aliens scheduled for removal.

Furthermore, in the last quarter of FY 1995 INS conducted a pilot program in the Philadelphia district under which all aliens with final orders of deportation, and all alien abscondees were targeted for removal. Factoring in the limited duration of the pilot, this was determined to be a successful strategy. Further field tests comprising different office sizes and population mixes will need to be conducted before a probative

determination can be made whether or not to adopt this strategy nationwide.

RECOMMENDATION 2 (page 18): We recommend that INS take more aggressive actions to remove non-detained aliens, such as: delivering surrender notices instead of mailing them to aliens.

INS RESPONSE: Concur in part. This strategy has much to commend it and INS is addressing it as part of a policy paper designed to modify the focus of field offices with regard to issues surrounding the removal on non-detained aliens. The policy paper is expected to be completed by April 1, 1996. The difficulty of such a policy, however, is that it is resource intensive, particularly in terms of the personnel necessary to implement it. In relation to recommendation 2, the OIG report states that the INS should consider taking aliens into custody at the time of personal delivery of surrender notices to them. Report, at 17. The INS response to recommendation 3 below addresses this issue.

RECOMMENDATION 3 (page 18): We recommend that INS take more aggressive actions to remove non-detained aliens, such as: taking aliens into custody at hearings when final orders are issued at hearings.

INS RESPONSE: Concur in part. Under INA § 242(a)(1), the Attorney General can detain any alien arrested pursuant to the INA, pending a final determination of deportability. In lieu of detention, the Attorney General may release the alien under specific conditions or bond. *Id.*; 8 C.F.R. § 242.2(c)(2). Subsequent to the issuance of a final order of deportation, the Attorney General may also detain an alien for a 6-month period from the date of such order or may

release the alien under specific conditions or bond. INA § 242(c).

[4]

When an alien has been released from INS custody under bond, such bond can be revoked by the district director pursuant to 8 C.F.R. § 242.2(e) but only based upon "a change of circumstances." *Matter of Sugay*, 17 I&N Dec. 637, 640 (1981). As such, INS must be able to justify any revocation decision, future detention or release condition. The determination of the district director is subject to review by an immigration judge and/or the Board of Immigration Appeals. 8 C.F.R. § 242.2(b).

The current custody determination process assesses the likelihood that the alien will appear for the deportation process, including surrendering for deportation. *Matter of Khalifah*, I&N Dec. (BIA Oct. 5, 1995) (scheduled interim decision). Furthermore, the existing bond contract requires the obligor to produce the alien until deportation proceedings are finally terminated or the alien is actually accepted for detention or deportation. INS Form I-352, Immigration Bond. Thus, current INS procedures treat detention or release as durational, from arrest through removal, and not episodic (from arrest to final order to removal).

If recommendation 2 and 3 were implemented, aliens would be taken into custody at hearings where final orders are issued and at the time of delivery of surrender notices. The taking of aliens into custody would require a custody redetermination based upon the likelihood of the aliens appearing for deportation. In practice, some aliens would likely still be released pending deportation, in light of resource and detention space limitations. Also, some case law casts doubt on

the notion that the entry of a final order of deportation alone (without any newly developed evidence) would constitute a changed circumstance sufficient to justify the taking of an alien into custody. *Cf. Noorani v. Smith*, 810 F. Supp. 280, 283-84 (W.D. Wash. 1993) (involving a challenge to district director's denial of parole to alien who had exhausted administrative relief). As such, the implementation of recommendations 2 and 3 could require revisions to the bond determination process and significant resource expenditures in addressing bond matters and related litigation.

This recommendation is one that INS has tried at various times and with varying degrees of success. The INS' current focus is on the removal of criminal aliens. Most nondetained aliens are not criminals. The INS is constantly expanding the amount of detention space available to it, but these spaces are chiefly to support its criminal alien removal initiatives. Furthermore, taking aliens into custody at hearing could encourage aliens not to accept a final order of deportation at the hearing by reserving appeal and then filing an appeal. These actions would necessarily delay the removal of such aliens. Still, the issue raised by this recommendation is one being studied by the Vera Institute of Justice at INS' behest.

RECOMMENDATION 4 (page 18) We recommended that INS take more aggressive actions to remove nondetained aliens, such as: pursuing aliens who fail to appear and reviewing procedures for closing cases for aliens who fail to appear.
[5]

INS RESPONSE: Concur in part. INS will revisit its policy on closing cases, both by Detention and Deportation and Investigations, of aliens who fail to appear. If

necessary this policy will be updated to reflect current policy and priorities.

INS expects to receive an FY 96 budget enhancement of $11.2 million dollars and 142 positions specifically intended to support Service efforts to locate and remove aliens who have been ordered deported and who have absconded. INS' primary enforcement efforts will focus on those who represent a danger to the public safety and security. Part of this effort entails an increase in INS bedspace devoted to abscondees.

INS does not have the manpower to search for and/or attempt to locate significant numbers of abscondees, but does initiate specific enforcement actions on abscondees based on INS' broad based interior enforcement strategy within the context of limited resources and established program priorities. That strategy of enforcement actions include (1) Employer Sanctions; (2) Anti-smuggling; (3) Fraud; (4) Violent Gang Task Force (VGTF); and (5) Organized Crime Drug Enforcement Task Force (OCDETF).

INS has recently reviewed, and is restructuring, its Investigative Case Management System to enhance its flexibility as a method of more effectively organizing its investigation workload in accordance with the Service's priorities.

RECOMMENDATION 5 (page 18) We recommended that INS take more aggressive actions to remove nondetained aliens, such as: coordinating with other governmental agencies to make use of all data bases available for tracking aliens who fail to appear.

INS RESPONSE: Concur in part. INS recognizes the need to use all available resources to track alien abscondees. These include the data systems and indices

of other agencies. Currently each INS district office independently contacts other agencies within its area. The policy memo expected to be completed by April 1, 1996, addresses the need to have, where possible, nationwide standardization of methods and procedures for coordinating searches with other governmental agencies.

Using FY '96 enhancements, the INS will emphasize the following activities to efficiently remove non-detained aliens who have been ordered deported:

(1) Establishment of abscondee removal teams in areas with the highest illegal alien populations. These teams will concentrate on cases with sufficiently recent leads to ensure a high degree of success. Careful screening to select cases with factors such as travel document availability and low probability of further administrative procedures or judicial challenge will minimize length of stay in detention and associated cost and free up detention beds for other cases.
[6]

(2) Entry of warrants and orders of deportation into the National Crime Information Center (NCIC). Aided by enabling legislation contained in the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322), the INS will expand its usage of the NCIC system to locate aliens who fail to appear for deportation.

(3) Increase capability to share information externally and internally to identify abscondees, using interfaces with state Departments of Motor Vehicles, NCIC, Social Security Administration, and the Internal Revenue Service.

(4) Develop an automated list of criminal abscondees and circulate within the law enforcement community; use LETN, public TV/radio, etc., to publicize.

Point of Contact: **Micheal J. Manual, Detention and Deportation, 202-616-7788**

/s/ [ILLEGIBLE]
T. ALEXANDER ALEINIKOFF
Executive Associate
Commisioner

APPENDIX III

OFFICE OF THE INSPECTOR GENERAL'S ANALYSIS OF MANAGEMENT'S RESPONSE

The INS response stated that they would take action on each of the report's recommendations. We consider all recommendations resolved and will close them when INS' proposed actions are completed.

The INS response addressed the report's two major findings and five recommendations. Our analysis includes INS' position in response to the two findings, as well as to the five recommendations. In response to comments on the second finding, we made one minor revision in the report. Specifically, we clarified our use of the term "final order."

Finding Number:

1. Removal of Detained Aliens. INS concurs.
2. Removal of Nondetained Aliens. INS concurs in part. The INS response cautions that final orders may be coupled with an order of voluntary departure, and cannot be executed until the voluntary departure period expires. The response also states that if judicial review of final orders is sought, the order is subject to execution only after the Federal court affirms it. We considered any grant of voluntary departure or petition to Federal courts in reviewing our sample cases. If voluntary departure was granted, we did not consider the order to be final until the time for voluntary departure had expired. If judicial review was sought, the date of the Federal court decision replaced the date of the final order issued by an

immigration judge or a BIA decision. If a judicial decision was pending, we deleted the case from our sample. We should note that we found approximately 3 percent of the nondetained aliens in our sample had departed voluntarily under an alternate final order. These aliens were included among the 11 percent of the nondetained aliens we reported as having been removed from the country.

Recommendation Number:

1. Resolved-Open. We agree with the actions proposed. We will close this recommendation when the data interface with EOIR has been implemented and when the assessment of the demonstration project has been completed. Please notify us when the data interface has been implemented and provide us with a copy of the assessment.
2. Resolved-Open. We agree with the discussion and will close this recommendation when INS provides us with a copy of the policy paper, if it adequately addresses the issue of taking more aggressive actions to remove nondetained aliens. [2]
3. Resolved-Open. We agree with the discussion and will close this recommendation when INS provides us with a copy of the Vera Institute of Justice study and advises us of the actions taken in response to the study.
4. Resolved-Open. We will close this recommendation when INS provides us with a copy of the revised policy on closing cases of aliens who fail to

appear, as updated to reflect current policy and priorities.

5. Resolved-Open. We agree with the actions proposed and will close this recommendation when INS: (i) provides us with the policy memo expected by April 1, 1996, addressing standardization of methods and procedures for coordinating searches with other governmental agencies; and (ii) notifies us that abscondee removal teams have been established in areas with the highest illegal alien populations.

Supreme Court, U.S.
FILED
AUG 29 2002

No. 01-1491

In the Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HYUNG JOON KIM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

AUSTIN C. SCHLICK
Assistant to the Solicitor General

DONALD E. KEENER
MARK C. WALTERS
HUGH G. MULLANE
MICHELLE GORDEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 1226(c)(1) of Title 8 of the United States Code requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed a specified offense, including an aggravated felony. Section 1226(c)(2) of Title 8 prohibits release of those aliens during administrative proceedings to remove them from the United States, except in very limited circumstances not present here. The question presented in this case is:

Whether respondent's mandatory detention under Section 1226(c) violates the Due Process Clause of the Fifth Amendment, where respondent concedes that his criminal convictions after admission into the United States put him within the class of removable aliens who are subject to detention.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	1
Statement	2
Summary of argument	8
Argument	11
I. Mandatory detention of criminal aliens under Section 1226(c) during proceedings to remove them from the United States is consistent with due process	11
A. Congress determined that criminal aliens' flight risk and danger to the community were serious problems that justified mandatory detention	12
B. Congress's determinations about the necessity of mandatory detention are judgments about immigration policy that merit particular judicial respect	23
C. *Zadvydas* supports a determination that Section 1226(c) is constitutional	38
II. Section 1226(c) does not in any event violate due process on its face	42
A. Aliens detained at the United States border have no due process right to avoid detention, and aliens who enter or remain illegally have a diminished due process	44
B. Mandatory detention during removal proceedings is particularly permissible as applied to aliens for whom there is not a significant likelihood of avoiding removal	46

TABLE OF CONTENTS—Continued: Page

C. Mandatory detention also is especially warranted when the alien has committed the most serious crimes that trigger Section 1226(c) 47
D. Section 1226(c) could not be held unconstitutional without reference to the duration of the alien's detention 48
Conclusion 49
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Carlson v. *Landon*, 342 U.S. 524 ..... 10, 33, 39, 47
Fiallo v. *Bell*, 430 U.S. 787 (1977) 23, 44
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 33
Hoang v. *Comfort*, 282 F.3d 1247 (10th Cir. 2002), petition for cert. pending, No. 01-1616 (filed May 3, 2002) 31, 32, 38, 39, 43
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 29
INS v. *St. Cyr*, 533 U.S. 289 (2001) 24, 28
INS v. *Stevic*, 467 U.S. 407 (1984) 29
INS v. *Yueh-Shaio Yang*, 519 U.S. 26 (1996) 27
Jay v. *Boyd*, 351 U.S. 345 (1956) 27
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 45
Jones v. *United States*, 526 U.S. 227 (1999) 42
Joseph, In re, 22 I.&N. Dec. 799, 1999 WL 339053 (BIA 1999) 26, 27
Kansas v. *Hendricks*, 521 U.S. 346 (1997) 35
Leng May Ma v. *Barber*, 357 U.S. 185 (1958) 44
Mathews v. *Diaz*, 426 U.S. 67 (1976) 33
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 5, 24
Narenji v. *Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980) 33
Olim v. *Wakinekona*, 461 U.S. 238 (1983) 27

Cases—Continued: Page

Parra v. *Perryman*, 172 F.3d 954 (7th Cir. 1999) 8, 32, 43, 46
Patel v. *Zemski*, 275 F.3d 299 (3d Cir. 2001) 32, 38, 39, 43
Plyler v. *Doe*, 457 U.S. 202 (1982) 32
Radoncic v. *Zemski*, 28 Fed. Appx. 113 (3d Cir. 2000), petition for cert. pending, No. 01-1459 (filed Apr. 4, 2002) 43, 46
Reno v. *Flores*, 507 U.S. 292 (1993) 10, 23, 31, 33, 41
Richardson v. *Reno*, 180 F.3d 1311 (11th Cir. 1999), cert. denied, 529 U.S. 1036 (2000) 25
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 32
Schall v. *Martin*, 467 U.S. 253 (1984) 48
Schlanger v. *Seamans*, 401 U.S. 487 (1971) 4
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) 23
Tefel v. *Reno*, 180 F.3d 1286 (11th Cir. 1999), cert. denied, 530 U.S. 1228 (2000) 27
United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537 (1950) 44
United States v. *Salerno*, 481 U.S. 739 (1987) 4, 43, 48
Vasquez v. *Reno*, 233 F.3d 688 (1st Cir. 2000), cert. denied, 122 S. Ct. 43 (2001) 4
Weiss v. *United States*, 510 U.S. 163 (1994) 32
Welch v. *Ashcroft*, 293 F.3d 213 (4th Cir. 2002) 24, 31, 32, 38, 39, 42, 43, 47, 48
Wong Wing v. *United States*, 163 U.S. 228 (1896) 11, 23, 46
Zadvydas v. *Davis*, 533 U.S. 678 (2001) ..... *passim*

Constitution, statutes and regulations:

U.S. Const. Amend. V 4, 1a
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7343(a), 102 Stat. 4470 12

Statutes and regulations—Continued: Page

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 21
§ 440(c), 110 Stat. 1277 21
§ 440(e), 110 Stat. 1277-1278 22
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 2
§ 303(b), 110 Stat. 3009-586 (8 U.S.C. 1226(c) note) 37, 47
§ 303(b)(2), 110 Stat. 3009-586 (8 U.S.C. 1226(c) note) 37
§ 304(a), 110 Stat. 3009-587 to 3009-593 2
Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 13
§ 501(a), 104 Stat. 5048 14
§ 504(a)(5), 104 Stat. 5049 14
§ 504(b), 104 Stat. 5050 (8 U.S.C. 1226(e)(1) (Supp. II 1990)) 14
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
§ 101, 8 U.S.C. 1101(a)(13)(B) 44
§ 101(a)(43), 8 U.S.C. 1101(a)(43) (1988) 13
§ 101(a)(43), 8 U.S.C. 1101(a)(43) 2, 13, 22, 33
§ 101(a)(43)(A), 8 U.S.C. 1101(a)(43)(A) 47
§ 101(a)(43)(E)(ii), 8 U.S.C. 1101(a)(43)(E)(ii) 34
§ 101(a)(43)(F), 8 U.S.C. 1101(a)(43)(F) 34
§ 101(a)(43)(G), 8 U.S.C. 1101(a)(43)(G) 3
§ 101(a)(43)(R), 8 U.S.C. 1101(a)(43)(R) 34
§§ 201-203, 8 U.S.C. 1151-1153 6
§ 208(b), 8 U.S.C. 1158(b) 30
§ 208(b)(2), 8 U.S.C. 1158(b)(2) 27
§ 212, 8 U.S.C. 1182 (1994) 24, 27
§ 212(c), 8 U.S.C. 1182(c) (1994) 28
§ 212(d)(5)(A), 8 U.S.C. 1182(d)(5)(A) 44

Statutes and regulations—Continued: Page

§ 236(a), 8 U.S.C. 1226(a) 1a
§ 236(c), 8 U.S.C. 1226(c) ..... *passim*
§ 236(c)(1), 8 U.S.C. 1226(c)(1) 2, 28, 1a
§ 236(c)(1)(A), 8 U.S.C. 1226(c)(1)(A) 22, 1a
§ 236(c)(1)(B), 8 U.S.C. 1226(c)(1)(B) 2, 22, 47, 1a
§ 236(c)(1)(B)-(C), 8 U.S.C. 1226(c)(1)(B)-(C) 2
§ 236(c)(1)(C), 8 U.S.C. 1226(c)(1)(C) 2, 22, 2a
§ 236(c)(1)(D), 8 U.S.C. 1226(c)(1)(D) 2, 22, 47, 2a
§ 236(c)(2), 8 U.S.C. 1226(c)(2) 2, 2a
§ 237(a)(1)(B), 8 U.S.C. 1227(a)(1)(B) 45
§ 237(a)(2), 8 U.S.C. 1227(a)(2) 47
§ 237(a)(2)(A), 8 U.S.C. 1227(a)(2)(A)-(D) 2
§ 237(a)(2)(A)(ii), 8 U.S.C. 1227(a)(2)(A)(ii) 3
§ 237(a)(2)(A)(iii), 8 U.S.C. 1227(a)(2)(A)(iii) 3-4
§ 237(a)(2)(B), 8 U.S.C. 1227(a)(2)(B) 2
§ 237(a)(2)(C), 8 U.S.C. 1227(a)(2)(C) 2
§ 237(a)(4)(B), 8 U.S.C. 1227(a)(4)(B) 2
§ 238(a), 8 U.S.C. 1228(a) 40
§ 239, 8 U.S.C. 1229 3
§ 240, 8 U.S.C. 1229a 3
§ 240A, 8 U.S.C. 1229b 27, 30
§ 240A(a)(3), 8 U.S.C. 1229b(a)(3) 47
§ 241(a), 8 U.S.C. 1231(a) 3, 38, 40
§ 241(a), 8 U.S.C. 1231(a)(6) 7, 38, 39, 40, 42
§ 241(b)(3), 8 U.S.C. 1231(b)(3) 24
§ 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A) 29
§ 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B) 30
§ 242(a), 8 U.S.C. 1252(a) (1982) 12
§ 242(a), 8 U.S.C. 1252(a) 13
§ 242(a)(1), 8 U.S.C. 1252(a)(1) (1994) 15
§ 242(a)(2), 8 U.S.C. 1252(a)(2) (1988) 13
§ 242(a)(2)(B), 8 U.S.C. 1252(a)(2)(B) (Supp. II 1990) 14
§ 242(a)(2)(B), 8 U.S.C. 1252(a)(2)(B) (1994) 14
§ 242(a)(3)(A), 8 U.S.C. 1252(a)(3)(A) (1988) 13

Statutes and regulations—Continued: Page

Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4320 22
Immigration Technical Corrections Act of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1751 (8 U.S.C. 1252(a)(2)(B) (1994)) 14
18 U.S.C. 16 ..... 14, 34
28 U.S.C. 2241 4
Cal. Penal Code (West 1999):
§ 484 3
§ 666 3
8 C.F.R.:
Section 3.1(a)(7) 40
Section 3.19(a) 26
Section 3.19(b) 26
Section 3.19(h)(2)(ii) 26
Section 208.16(b) 29
Section 208.16(f) 29
Section 208.22 29
Section 236.1(c)(10) 26
Section 236.1(d)(1) 26
Section 236.1(d)(3) 26
Section 242.2(c) (1996) 14
Section 242.2(d) (1996) 15
Section 242.2(h) (1996) 14

Miscellaneous:

133 Cong. Rec. (1987):
p. 8771 13
p. 28,840 ..... 12, 13
p. 28,841 13
140 Cong. Rec. 4985 (1994) 16
141 Cong. Rec. (1995):
p. 4394 35
pp. 4395-4396 35

Miscellaneous—Continued: Page

p. 15,018 17
p. 15,038 17
142 Cong. Rec. (1996):
p. 5281 21
pp. 5293-5294 21
p. 7348 16
p. 7349 16
Criminal and Illegal Aliens, Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 1996 WL 502071 (Sept. 5, 1996) 21, 36
Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 103d Cong., 1st Sess. (1993) 17, 18, 19, 21, 36, 38
67 Fed. Reg. (Aug. 13, 2002):
p. 52,627 28
pp. 52,628-52,629 28
p. 52,629 28
Hearing on H.R. 723 Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary, 103d Cong., 2d Sess. (1994) 17, 34
Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and International Law, of the House Comm. on the Judiciary, 101st Cong., 1st Sess. (1989) 16, 17, 20, 34, 35, 37
H.R. 3529, 100th Cong., 1st Sess. (1987) 12-13
H.R. Rep. No. 22, 104th Cong., 1st Sess. (1995) 17, 18, 34
H.R. Rep. No. 469, 104th Cong., 2d Sess., Pt. 1 (1996) 16, 19, 34, 35
H.R. Rep. No. 645, 103d Cong., 2d Sess. (1994) 18

Miscellaneous—Continued: Page

INS:
Enforcement, Fiscal Year 2000 <http://www.ins.gov/graphics/aboutins/statistics/00yrbk__REF/RA2000.pdf7> 30
Refugees, Asyees, Fiscal Year 2000 <http://www.ins.usdoj.gov/graphics/aboutins/statistics/00yrbk__REF/RA2000.pdf7> 30
Restatement (Second) of Torts (1965) 45
S. 972, 100th Cong., 1st Sess. (1987) 13
S. Rep. No. 48, 104th Cong., 1st Sess. (1995) 15, 17, 19, 21, 22, 25, 42, 46
S. Rep. No. 249, 104th Cong., 2d Sess. (1996) 16
Testimony of Doris Meissner, Commissioner, INS, Before the Senate Judiciary Comm. Concerning S. 269, the Immigrant Control and Financial Responsibility Act of 1995 and the Immigration Enforcements Improvements Act of 1995, 1995 WL 110438 (Mar. 14, 1995) 16, 34

In the Supreme Court of the United States

No. 01-1491

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HYUNG JOON KIM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 276 F.3d 523. The memorandum order of the district court (Pet. App. 31a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2002. The petition for a writ of certiorari was filed on April 9, 2002, and was granted on June 28, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set out in an appendix to this brief. App, *infra*, 1a-3a.

STATEMENT

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to streamline procedures for removing certain criminal aliens from the United States. The provision of IIRIRA that is at issue in this case is Section 236(c) of the INA, 8 U.S.C. 1226(c). Section 1226(c)(1) requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed specified crimes. In the case of a deportable alien, Section 1226(c)(1) applies if the alien has been convicted of any of certain crimes including an aggravated felony (as defined in INA § 101(a)(43), 8 U.S.C. 1101(a)(43)), two or more crimes involving moral turpitude or a crime of moral turpitude that resulted in a sentence of at least one year's imprisonment, a controlled-substance offense (other than simple possession of 30 grams or less of marijuana), a firearms offense, a specified immigration offense, espionage, sabotage, treason, or threatening the President, see 8 U.S.C. 1226(c)(1)(B) and (C), 1227(a)(2)(A)-(D), or if the alien has engaged in terrorist activities, see 8 U.S.C. 1226(c)(1)(D), 1227(a)(4)(B). Section 1226(c)(2) prohibits the release of aliens detained under Section 1226(c)(1) during the pendency of administrative proceedings instituted to remove them from the United States, except in very limited circumstances involving witness protection. 8 U.S.C. 1226(c)(2).

Detention under Section 1226(c) lasts only for the duration of the criminal alien's administrative removal proceedings.[1]

[1] In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-593, Congress instituted a new form of proceeding—known as "removal"—that applies to aliens who have entered the United States but are deportable, as well as to aliens who are inadmissible at the border. See 8 U.S.C. 1229, 1229a.

Detention of an alien following the entry of a final order of removal is governed by Section 241(a) of the INA, 8 U.S.C. 1231(a), which this Court interpreted in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001). In *Zadvydas*, this Court avoided constitutional concerns by interpreting 8 U.S.C. 1231(a) to limit the duration of detention of two permanent resident aliens following final orders directing their removal from the United States. See 533 U.S. at 688-701.

2. Respondent is a native and citizen of the Republic of Korea (South Korea). Respondent entered the United States legally in 1984 and became a lawful permanent resident of the United States in 1986, when he was eight years old. Pet. App. 2a, 31a-32a. In July 1996, when he was 18 years old, respondent was convicted in California state court of first degree burglary for unlawfully entering an inhabited dwelling house and inhabited portion of a building, for which he was sentenced to a suspended sentence of five years' imprisonment. See Sentence, No. SC961052 (Cal. Super. Ct. Aug. 1, 1996); Information, No. SC961052 (Cal. Super. Ct. dated May 7, 1996). In April 1997, respondent was convicted of "petty theft with priors," in violation of California Penal Code Sections 666 and 484 (West 1999), for which he received a sentence of three years' imprisonment. See Pet. App. 32a.

In December 1998, while respondent was serving his three-year state sentence, the INS charged respondent with being deportable because of his 1997 conviction for an aggravated felony.[2] Pet. App. 32a; see 8 U.S.C. 1101(a)(43)(G),

[2] On August 16, 2002, the INS served respondent with an additional charge of being removable because his 1996 burglary conviction and 1997 theft conviction together constitute "convict[ions] of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct." 8 U.S.C. 1227(a)(2)(A)(ii).

1227(a)(2)(A)(iii). Respondent was released from state prison on February 1, 1999. On February 2, 1999, the INS took respondent into custody under Section 1226(c) and commenced removal proceedings. Pet. App. 2a, 32a. In light of the mandatory nature of Section 1226(c), the INS's San Francisco District declined to release respondent on bond. See *id.* at 33a; C.A. E.R. 3.

3. On May 17, 1999, respondent commenced this habeas corpus action under 28 U.S.C. 2241 in the United States District Court for the Northern District of California. Pet. App. 2a, 31a, 33a. Respondent asserted in his habeas corpus petition that Section 1226(c) is unconstitutional on its face because detention of a removable criminal alien without an individualized bond hearing violates substantive and procedural due process guaranteed by the Fifth Amendment. Respondent did not dispute that he had committed an aggravated felony, and he conceded that he is subject to mandatory detention under the terms of Section 1226(c). J.A. 8-10; see Br. in Opp. 1-2.[3]

On August 11, 1999, the district court declared Section 1226(c) unconstitutional on its face and ordered an individualized bond hearing to determine whether respondent presents a flight risk or a danger to the community. Pet. App. 31a-51a. Using the analytic framework of *United States* v. *Salerno*, 481 U.S. 739, 747 (1987), the district court

[3] Respondent brought his habeas corpus action against the District Director of the San Francisco District of the INS and the Attorney General of the United States. See Pet. App. 31a, 33a. The District Director was the custodian of respondent and was present in the Northern District of California, and therefore was the proper respondent to the habeas corpus petition. The Attorney General was not respondent's immediate custodian and was not present in the Northern District of California, and therefore was not a proper respondent to the habeas corpus petition. See *Schlanger* v. *Seamans*, 401 U.S. 487 (1971); *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000), cert. denied, 122 S. Ct. 43 (2001).

reasoned that "lawful resident aliens possess substantive due process rights during deportation proceedings" (Pet. App. 39a), and that "[l]ess excessive means exist for accomplishing Congress' goals [in enacting Section 1226(c)], such as having individualized bail hearings" (*id.* at 45a). Although the district court thus focused specifically on the substantive due process rights of permanent resident aliens, the court's holding was that Section 1226(c) "is unconstitutional on its face." *Id.* at 48a. In the alternative, the district court held that Section 1226(c) denies criminal aliens procedural due process under the analysis of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Pet. App. 48a-50a.

After the district court's decision, the District Director of the INS released respondent on $5000 bond. Pet. App. 2a; see J.A. 11. Respondent then requested a continuance of his administrative removal proceedings. The immigration court granted respondent's request and rescheduled his removal hearing for March 2002. See Pet. App. 2a. After respondent obtained new counsel, the hearing was continued again at respondent's request, and over the INS's objection, until December 24, 2003.[4]

4. The court of appeals affirmed on the ground that Section 1226(c) violates substantive due process when applied to respondent, as a permanent resident alien. Pet. App. 30a. The court of appeals, however, specifically did not affirm the district court's facial invalidation of Section 1226(c). The court noted in particular that it was not addressing whether Section 1226(c) is constitutional as applied to excludable

[4] As a matter of policy, the Justice Department's Executive Office for Immigration Review expedites removal proceedings for aliens who are detained under Section 1226(c). Respondent is not subject to that expedition policy because he was released upon order of the district court and thereafter has not been treated as a detained alien.

aliens who have been detained at the United States border. *Id.* at 5a-6a.

The court of appeals first emphasized respondent's status as a lawful permanent resident alien, observing that this "most favored" (Pet. App. 7a) immigration status entitles an alien to live permanently in the United States, to work in this country, and to apply for citizenship, and that permanent resident status most often is granted because of the alien's family ties to the United States. See generally 8 U.S.C. 1151-1153. The court concluded that, because of their statutory rights and potentially strong family and business ties to the United States, lawful permanent resident aliens have a liberty interest in freedom from detention during removal proceedings, which the Constitution protects. Pet. App. 7a-8a.

The court of appeals next reasoned that although detention of lawful permanent residents under Section 1226(c) "is civil and regulatory" in nature, "not criminal or punitive" (Pet. App. 12a; see *Zadvydas*, 533 U.S. at 690), that detention is permissible only if the government "provide[s] a 'special justification' outweighing the individual's liberty interest" (Pet. App. 11a (quoting *Zadvydas*, 533 U.S. at 690)). The court identified "two principal justifications" for mandatory detention: "(1) preventing criminal aliens from fleeing during removal proceedings; and (2) protecting the public from potentially dangerous aliens." *Id.* at 12a. But the court found those justifications insufficient.

The court of appeals acknowledged the government's interest in ensuring criminal aliens' availability for removal from the country. Pet. App. 12a. The court held, however, that ensuring availability for removal does not justify mandatory detention during removal proceedings because some criminal aliens may be able to obtain a determination that they are not removable, or to obtain relief from removal under the provisions of the INA. See *id.* at 13a-15a. The

court also rejected the government's reliance on a 1996 Justice Department study (J.A. 14-64) that showed that 89% of "nondetained" aliens subject to a final deportation order failed to appear for deportation. The court believed that the Justice Department study in fact suggested that aliens who have been released on bail are likely to be removed successfully. See Pet. App. 15a-16a; but see note 7, *infra*.

The court of appeals also recognized the government's interest in protecting the public against additional wrongdoing by criminal aliens while removal proceedings are pending. See Pet. App. 16a-17a. The court concluded, however, that the "aggravated felony" classification that triggered respondent's mandatory detention under Section 1226(c) reaches crimes that the court did not deem "egregious" or inherently suggestive of a public "menace[]." *Id.* at 20a. The court thus determined that commission of one of the crimes that requires detention under Section 1226(c) is not sufficiently probative of dangerousness to justify mandatory detention of a permanent resident alien. *Id.* at 20a-21a.

The court of appeals cited congressional testimony by a former Commissioner of the INS for the proposition that "the government itself appears to have some doubt about" the necessity and desirability of the mandatory detention required by Section 1226(c). Pet. App. 21a. The court also concluded that the necessity of mandatory detention of criminal aliens during administrative removal proceedings is called into question by 8 U.S.C. 1231(a)(6), which gives the Attorney General discretion to release criminal aliens who are *under a final order of removal*, if they have not been removed during the 90-day removal period. Pet. App. 22a-23a. The court of appeals therefore determined "that the government has not provided a 'special justification' for no-bail civil detention sufficient to overcome a lawful permanent resident alien's liberty interest." *Id.* at 23a. In doing so, the court of appeals disagreed (*id.* at 26a-27a) with the Seventh

Circuit's decision in *Parra* v. *Perryman*, 172 F.3d 954 (1999), which upheld Section 1226(c) against a due process challenge by a lawful permanent resident alien.[5]

Finally, the court of appeals determined that there is no plausible narrowing construction of Section 1226(c) that would cause it to satisfy substantive due process. See Pet. App. 27a-29a. Accordingly, the court held that a lawful permanent resident alien in removal proceedings must be afforded "a bail hearing with reasonable promptness to determine whether the alien is a flight risk or a danger to the community." *Id.* at 30a.

SUMMARY OF ARGUMENT

I. A. The mandatory detention requirement of 8 U.S.C. 1226(c) is the product of Congress's close scrutiny of the actual consequences of allowing release of criminal aliens. The legislative record showed that approximately 80% of deportable criminal aliens had multiple arrests while in the United States, and that nearly half of those aliens were re-arrested within a year of being released from prison. More than 20% of criminal aliens who were released by the Attorney General or never taken into custody during their deportation proceedings failed to appear for the proceedings. When non-detained aliens were ordered to appear for deportation from the United States, nearly 90% absconded. Numerous witnesses confirmed that mandatory detention should be part of Congress's solution to those problems.

Congress determined that existing statutory provisions that gave the Attorney General discretion to release criminal aliens were not ensuring removal of the most undesirable aliens from the United States. Congress con-

---

[5] The court of appeals also expressed the view (Pet. App. 23a-26a) that its decision was consistent with the analysis of Justice Kennedy's dissenting opinion in *Zadvydas*, 533 U.S. at 705-725.

cluded that mandatory detention of a selected group of criminal aliens, during the pendency of their removal proceedings, is necessary to implement its immigration policies.

B. The policy judgments that Congress made when it enacted Section 1226(c) are within its plenary power over the admission and expulsion of aliens and deserve judicial deference. The court of appeals' reasons for holding Section 1226(c) unconstitutional are without merit.

The court of appeals deemed it important that a criminal alien's removal proceedings will not *always* result in a final order of removal. That has no bearing upon Congress's effort to ensure that the criminal aliens specified in Section 1226(c) appear at the removal proceedings themselves. Furthermore, an alien who disputes that he is removable may raise that argument as a challenge to his detention, and will be released if he shows that the INS is substantially unlikely to prevail on its charge of removability.

The theoretical possibility that a criminal alien might obtain discretionary relief from removal or withholding of removal also does not undermine the constitutionality of Section 1226(c). As part of its effort to address the serious problem of criminal aliens, Congress imposed rules that make the removal of those aliens more certain and more speedy. Those restrictions and Section 1226(c) are mutually reinforcing, because each makes it very likely that a criminal alien subject to detention under Section 1226(c) will soon be removed.

Congress similarly acted within the scope of its plenary immigration powers when it determined that criminal aliens who flee from removal proceedings present a special danger to the Nation. Congress routinely makes categorical judgments about the admission, treatment, and removal of different groups of aliens. Even when detention is at issue, this Court has upheld the use of a categorical approach in the immigration context, subject to only deferential judicial

review. See *Reno* v. *Flores*, 507 U.S. 292 (1993); *Carlson* v. *Landon*, 342 U.S. 524 (1952). Here, Congress's judgment rests upon the high recidivism rate for criminal aliens, as well as the nature of the crimes specified in Section 1226(c). The crimes that trigger Section 1226(c) are ones that Congress found to present special concerns because of their implications for national security or public safety.

C. *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), supports the constitutionality of Section 1226(c). The critical fact in *Zadvydas*, which gave rise to constitutional concern, was that the deportable aliens in that case, who were under final orders of removal, might be subject to indefinite (and possibly permanent) detention if they could not be removed. Section 1226(c), by contrast, is limited in duration because it applies only while the alien is in proceedings to determine whether there will be a final order of removal. Throughout the period of detention, Section 1226(c) always serves the purpose of ensuring the alien's availability for removal proceedings, as well as for removal if it is ordered. And Section 1226(c) does not raise the possibility of open-ended detention as in *Zadvydas*. Indeed, removal proceedings are expedited for aliens who are in detention and generally are resolved by immigration judges within approximately one month.

II. Respondent's facial due process challenge to Section 1226(c) is especially untenable, because respondent clearly cannot show that Section 1226(c) violates due process in every application. For example, an alien who was stopped at the border has no due process claim to be released from detention under Section 1226(c), which prevents him from entering the United States without authorization while his removal proceeding is pending. Likewise, an alien who entered or remained in the United States illegally, and committed further crimes during his unlawful presence, has an especially weak claim to due process protection in this context. A criminal alien who has no significant likelihood of

avoiding removal likewise could not present a viable due process challenge to detention pending his impending removal. And some removable aliens will have committed crimes, such as terrorist activities or the most egregious felonies, that justify mandatory detention without regard to other governmental interests. Finally, Section 1226(c) could not be held unconstitutional without reference to the duration of the alien's detention. The necessity of considering factors such as these demonstrates that a facial due process attack on Section 1226(c) cannot succeed.

ARGUMENT

I. MANDATORY DETENTION OF CRIMINAL ALIENS UNDER SECTION 1226(C) DURING PROCEEDINGS TO REMOVE THEM FROM THE UNITED STATES IS CONSISTENT WITH DUE PROCESS

Aliens detained under 8 U.S.C. 1226(c) have committed crimes that terminate their entitlement to remain in the United States. In their criminal proceedings, those aliens benefitted from the same due process protections as United States citizens. See *Wong Wing* v. *United States*, 163 U.S. 228, 237 (1896). Congress has determined that *after* their criminal convictions, those aliens should be removed from the United States with as much certainty, and as little risk to the public, as possible. The mandatory detention provisions of Section 1226(c) effectuate those objectives. Because Congress enacted Section 1226(c) in the exercise of its plenary power to direct the removal of unwelcome aliens from the United States, because the legislative record compiled by Congress concretely demonstrated the widespread problem of flight and recidivism among criminal aliens, and because detention under Section 1226(c) applies only to aliens who have committed specified crimes and lasts only

during the limited duration of the alien's removal proceedings, Section 1226(c) satisfies due process.

A. Congress Determined That Criminal Aliens' Flight Risk And Danger To The Community Were Serious Problems That Justified Mandatory Detention

Congress required the Attorney General to detain specified criminal aliens during their removal proceedings because it determined that earlier detention procedures, which allowed discretionary release, had failed to ensure the removal of criminal aliens from the United States. That legislative determination was made after an extensive investigation by Congress, in an area in which congressional findings are entitled to particular judicial respect.

1. Until the late 1980s, Section 242 of the INA afforded the Attorney General wide latitude to release criminal aliens from custody during their deportation proceedings. The law provided that "[p]ending a determination of deportablity" in administrative proceedings, an alien "*may*, upon warrant of the Attorney General, be arrested and taken into custody." 8 U.S.C. 1252(a) (1982) (emphasis added). When the Attorney General detained an alien, he had discretion (subject to judicial review in habeas corpus proceedings) whether to keep the alien in custody, release the alien on bond, or release the alien on conditional parole. 8 U.S.C. 1252(a) (1982).

In 1988, Congress limited the Attorney General's discretion over custody determinations as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7343(a), 102 Stat. 4470. Representative Smith, one of the sponsors of the 1988 legislation, expressed the concern that "[a]ll too often, [criminal] aliens—whether here legally or illegally—who are arrested for various felonious crimes, evade deportation, dodge trials, and continue with their recidivist activities." 133 Cong. Rec. 28,840 (1987) (discussing H.R. 3529, 100th Cong., 1st Sess. (1987)). He noted that, whereas more than 100,000 illegal aliens were arrested for criminal offenses in 1986, the INS was able to deport only 12,000. *Ibid.*; *id.* at 8771 (statement of Sen. Chiles, introducing S. 972, 100th Cong., 1st Sess. (1987)). Representative Smith also explained that criminal aliens operated major narcotics syndicates throughout the United States and "have been connected with money laundering, racketeering, weapons sales, prostitution rings, and a host of other heinous crimes." *Id.* at 28,840. "[O]ften," he observed, criminal aliens "are able to pay expensive bonds and disappear under a new identity" until arrested again "with a different name and a new offense." *Ibid.*; see *id.* at 8771. Senator Chiles observed that the presence of criminal aliens "is so widespread and lucrative that they are attracting other aliens into the United States to join in the illegal enterprises." *Id.* at 8771.

As part of an effort to address the "growing problem of felonious aliens," 133 Cong. Rec. at 28,841 (Rep. Smith), Congress amended Section 242(a) of the INA by providing that "[t]he Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction," and prohibiting the Attorney General from releasing those deportable aliens. 8 U.S.C. 1252(a)(2) (1988). Congress defined the term "aggravated felony" to include murder, drug trafficking, and trafficking in firearms or destructive devices. 8 U.S.C. 1101(a)(43) (1988). Congress additionally required the Attorney General to pursue new initiatives for the identification and apprehension of criminal aliens. 8 U.S.C. 1252(a)(3)(A) (1988).

Congress refined the INA's detention provisions in the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. On one hand, Congress broadened the definition of "aggravated felony" set out in 8 U.S.C. 1101(a)(43) by adding additional narcotics trafficking offenses, crimes of violence

(as defined in 18 U.S.C. 16) for which a prison term of at least five years was imposed, and like offenses in violation of foreign law—thus expanding the category of criminal aliens potentially subject to mandatory detention. See Pub. L. No. 101-649, § 501(a), 104 Stat. 5048. Congress also required detention of inadmissible aggravated felons during their exclusion proceedings. See Pub. L. No. 101-649, § 504(b), 104 Stat. 5050 (codified at 8 U.S.C. 1226(e)(1) (Supp. II 1990)). On the other hand, Congress added to Section 242 a new provision, 8 U.S.C. 1252(a)(2)(B) (Supp. II 1990), that required the Attorney General to release a permanent resident alien from custody during his deportation proceeding "if the Attorney General determines that the alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings." See Pub. L. No. 101-649, § 504(a)(5), 104 Stat. 5049.

In 1991, Congress again amended the provision governing detention and release by clarifying that the alien had the burden of proving non-dangerousness and the absence of a flight risk, and by extending the possibility of release to all lawfully admitted aliens who could make the necessary showing, rather than just permanent resident aliens. See Immigration Technical Corrections Act of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1751 (codified at 8 U.S.C. 1252(a)(2)(B) (1994)).

Due to the various amendments, as of 1991 lawfully admitted aliens convicted of aggravated felonies could obtain discretionary release from custody during their deportation proceedings, provided that they could demonstrate that they were not a threat to the community and were likely to appear for any scheduled deportation hearings. See 8 U.S.C. 1252(a)(2)(B) (1994); see also 8 C.F.R. 242.2(c) and (h) (1996). As had long been the case, moreover, the Attorney General continued to have discretion whether to detain, during the pendency of deportation proceedings, criminal aliens whose

crimes did not include an aggravated felony. See 8 U.S.C. 1252(a)(1) (1994); see also 8 C.F.R. 242.2(d) (1996).

2. While Congress was addressing the specific question of detention of criminal aliens during the late 1980s and early 1990s, it also began to consider wholesale reform of the Nation's immigration laws, including revisions that would enable the INS to remove aliens convicted of serious crimes more expeditiously from the United States. Congress concluded after extensive investigation that "America's immigration system is in disarray and criminal aliens (non-U.S. citizens residing in the U.S. who commit serious crimes for which they may be deportable) constitute a particularly vexing part of the problem." S. Rep. No. 48, 104th Cong., 1st Sess. 1 (1995). That conclusion led to the enactment in 1996 of IIRIRA, including its provision for mandatory detention of aliens convicted of serious crimes, during the pendency of their removal proceedings.

Congress's investigation showed that at least 450,000 aliens were incarcerated or under some form of criminal justice supervision, and that the INS could not identify most deportable criminal aliens, much less locate them and remove them from the country. S. Rep. No. 48, *supra*, at 1, 2. Indeed, the Senate Governmental Affairs Committee calculated that, at the then-current rate of deportation, it would take more than 23 years to remove every criminal alien who was *already* subject to deportation. *Id.* at 5.

Congress's inquiry into the problem identified three particular concerns about the INS's failure to remove more criminal aliens. First, criminal aliens' ongoing presence in the United States undermined the Nation's immigration policies and control of the Nation's borders. As the House Report on IIRIRA explained, Congress concluded that "our immigration laws should enable the prompt admission of those who are entitled to be admitted, the prompt exclusion or removal of those who are not so entitled, and the clear

distinction between these categories." H.R. Rep. No. 469, 104th Cong., 2d Sess., Pt. 1, at 111 (1996). Congress determined that "[a]liens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others, potential legal immigrants whose presence would be more consistent with the judgment of the elected government of this country about what is in the national interest." S. Rep. No. 249, 104th Cong., 2d Sess. 7 (1996); see 142 Cong. Rec. 7348, 7349 (1996) (statement of Sen. Abraham) (removing criminal aliens opens "slots in this country for immigrants who want to make a contribution.").

Furthermore, as an official of the General Accounting Office testified, failures in removing deportable aliens "ha[d] to be addressed to have an effective immigration policy." *Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary* (*1989 House Hearing*), 101st Cong., 1st Sess. 71-72 (1989). Reinforcing that view, the Commissioner of the INS testified that "[o]ne of the most important deterrents to illegal immigration is a credible and timely threat of removal for violation of the immigration laws." Testimony of Doris Meissner, Commissioner, INS, Before the Senate Judiciary Comm. Concerning S. 269, the Immigrant Control and Financial Responsibility Act of 1995 and the Immigration Enforcement Improvements Act of 1995, 1995 WL 110438 (Mar. 14, 1995).

Second, Congress determined that criminal aliens who are not timely removed "are a serious threat to our public safety." 140 Cong. Rec. 4985 (1994) (statement of Sen. Roth). A report prepared by the House Judiciary Committee explained that as a result of past congressional and Executive Branch policies, "many aliens who committed serious crimes were released into American society after they were released from incarceration, where they then continue to pose

a threat to those around them." H.R. Rep. No. 22, 104th Cong., 1st Sess. 6-7 (1995). There was hard evidence of criminal aliens' recidivism. A 1986 study by the General Accounting Office found that, out of a sample of 200 felony arrestees in New York whom the INS identified as being potentially deportable, 77% were arrested at least one more time before the INS initiated deportation proceedings, and 45% were arrested multiple times before their deportation proceedings began. *1989 House Hearing, supra*, at 54, 62; see 141 Cong. Rec. 15,018, 15,038 (1995) (statement of Sen. Abraham). In Los Angeles, 40% of the deportable aliens who were released from the County Jail in May 1990 were rearrested within the next 12 months, and 80% had a history of previous or subsequent arrests (totaling seven arrests, on average). *Hearing on H.R. 723, et al., Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary* (*1994 House Hearing*), 103d Cong., 2d Sess. 171, 173 (1994) (statement of Rep. Beilenson).

Third, Congress found that the INS's failure to remove recidivist criminal aliens was imposing a "significant cost * * * on our society." H.R. Rep. No. 22, *supra*, at 6-7. The Senate Committee on Governmental Affairs estimated that confinement of criminal aliens in state and federal prisons cost taxpayers at least $724 million per year. S. Rep. No. 48, *supra*, at 1, 9; *Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs* (*1993 Senate Hearing*), 103d Cong., 1st Sess. 13-14 (1993). There were 53,000 criminal aliens in federal and state prisons in 1995, as compared to fewer than 9000 in 1980. Criminal aliens were the "fastest growing segment of federal prison population" and comprised approximately 25% of all federal inmates. S. Rep. No. 48, *supra*, at 1, 6-7. Criminal aliens likewise made up 16% of California's state prison population, and they "place[d] a substantial burden on certain local and

State governments" because of the costs of prosecuting and incarcerating criminal aliens and their contribution to prison overcrowding. H.R. Rep. No. 645, 103d Cong., 2d Sess. 4, 18, 21 (1994); see *1993 Senate Hearing*, *supra*, at 13 ("Law enforcement costs money and a considerable amount of money is being spent policing, adjudicating, confining and deporting criminal aliens.").

3. Motivated by the collective force of those concerns, Congress resolved "to help ensure that aliens convicted of serious crimes are promptly removed from our society after serving their [criminal] sentence." H.R. Rep. No. 22, *supra*, at 6. Accomplishing that objective in turn required consideration of the frequency with which criminal aliens, once located, were absconding before their deportation. While the mandatory detention provisions instituted by the Anti-Drug Abuse Act of 1988 had "prevent[ed] the very worst of the criminal aliens from further endangering the public and from being able to flee before deportation," the 1990 and 1991 amendments—which restored the possibility of bond for certain aggravated felons—had "weakened substantially" the government's efforts to deport criminal aliens and to protect public safety. *1993 Senate Hearing*, *supra*, at 15, 26 (staff report and testimony); see H.R. Rep. No. 22, *supra*, at 12. The Senate Governmental Affairs Committee found that as a result of the 1990 and 1991 amendments, and because of a shortage of space in INS detention facilities, "many [criminal aliens] who should be detained [during deportation proceedings] are released on bond." H.R. Rep. No. 22, *supra*, at 2; see *1993 Senate Hearing*, *supra*, at 21 (staff report) ("Although detaining a criminal alien pending his removal proceeding guarantees that the alien will actually appear at that proceeding, this option is often not available due to INS's chronic lack of detention space."). The House Judiciary Committee agreed that the INS's failure to detain aliens during their deportation proceedings was "[a] chief

reason why many deportable aliens are not removed from the United States." H.R. Rep. No. 469, *supra*, Pt. 1, at 123.

Congress had before it specific evidence about the consequences of allowing discretionary release of criminal aliens during their deportation proceedings. According to information collected in 1992, more than 20% of criminal aliens who were released on bond or otherwise not kept in custody throughout their deportation proceedings failed to appear for those proceedings. S. Rep. No. 48, *supra*, at 2, 23; *1993 Senate Hearing*, *supra*, at 21. The rate of flight doubled to 42% for criminal aliens whom the INS had not taken into custody at any time before a final order of deportation was entered. *1993 Senate Hearing*, *supra*, at 21. In 1992 alone, approximately 11,000 aliens who had committed an aggravated felony failed to appear for their deportation hearing. *Id.* at 3.

A "related" problem was that aliens who were not already in INS custody were overwhelmingly likely to abscond from actual deportation. *1993 Senate Hearing*, *supra*, at 9. In New York in fiscal year 1993, 88% of non-detained aliens failed to report for deportation after receiving a notice of their scheduled departure.[6] *Ibid.*; S. Rep. No. 48, *supra*, at 23-24; accord J.A. 38-39 (372 notices in nationwide sample resulted in 40 alien surrenders). Consistent with the New York data, the Justice Department's Inspector General calculated in March 1996, based upon a sample of 1058 cases in 1993 and 1994, that only 11% of non-detained aliens with final orders of deportation were successfully removed from the United States, whereas the INS was able to remove almost 94% of the detained aliens who were ordered deported. (The remaining 6% were allowed to stay in this country for

---

[6] Because of the extraordinarily high flight rate, INS officials often referred to the INS's departure notices as "run notices." S. Rep. No. 48, *supra*, at 24; see J.A. 38.

political or humanitarian reasons, or remained for other reasons unrelated to their availability for removal.) J.A. 14, 21, 26, 32.[7]

Witnesses before Congress who were intimately familiar with the problem of absconding criminal aliens confirmed the importance of detaining those aliens pending deportation. Based upon its investigation, the General Accounting Office advised that "[w]e know that alternatives to detaining prisoners don't often work." *1989 House Hearing*, *supra*, at 75; accord J.A. 46 (Justice Department Inspector General's conclusion that "[d]etention is key to effective deportation"); see J.A. 17, 47 (same). Similarly, the Chief of the Trial Division of the Manhattan District Attorney's Office told the House Judiciary Committee that his "[n]umber one" recommendation for addressing the problem of criminal aliens was to incarcerate alien aggravated felons for their crimes, and then

---

[7] In this case, the Ninth Circuit deemed it "obvious" that aliens released on bond were counted as "detained" aliens in the Inspector General's report, and thus did not contribute to the 89% "skip rate." Pet. App. 15a-16a & n.1. The conclusion that the Inspector General would describe aliens who were released from custody as "detained" is, to say the least, not "obvious." In fact, contrary to the court of appeals' belief, the text of the Inspector General's report confirms that aliens who were released on bond rather than held in detention were counted in the category of "nondetained" aliens, who had an overall 11% removal rate. See J.A. 36 ("[INS] staff cited *detained aliens and aliens released on bond* as their priority cases. *Other nondetained cases* were worked as time allowed.") (emphasis added). The court relied, as support for its linguistically unlikely reading, on the report's statement that two detained aliens who were released on bond absconded. Pet. App. 16a n.1. But we have been informed by the Office of the Inspector General that—consistent with the language in its report—it in fact counted aliens who were released on bond while awaiting removal within the "nondetained" category. The two aliens referred to in the portion of the report cited by the court of appeals were held in INS detention for a period after the entry of a final order of deportation and were only later released on bond.

"detain and deport" them. *Id.* at 120, 130. The Executive Director of the Justice Department office responsible for adjudicating deportation proceedings suggested that no amount of bond could ensure aliens' appearance at those proceedings. *Id.* at 35 (testimony of David Milhollan). And the INS informed Congress that it had used appropriated funds to take additional aliens into custody during their deportation proceedings in fiscal year 1996, which "contributed greatly to [a] 25 percent increase in removals" of aliens during that year. *Criminal and Illegal Aliens, Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 1996 WL 502071 (Sept. 5, 1996) (statement of David A. Martin, General Counsel, INS).

Such evidence led Congress ineluctably to conclude that discretionary release of deportable criminal aliens was undermining enforcement of the immigration laws, and that mandatory detention during removal proceedings would be an effective measure to ensure the aliens' availability for removal. See, *e.g.*, S. Rep. No. 48, *supra*, at 32 ("Congress should consider requiring that all aggravated felons be detained pending deportation. Such a step may be necessary because of the high rate of no-shows for those criminal aliens released on bond."); *1993 Senate Hearing*, *supra*, at 24 (same); 142 Cong. Rec. 5281, 5293-5294 (1996) (recommendation of Congressional Task Force on Immigration Reform to require detention of all criminal aliens).

4. In April 1996, Congress addressed the problem of criminal aliens when it enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Section 440(c) of AEDPA, 110 Stat. 1277, overrode the 1990 and 1991 amendments that had allowed the Attorney General to release lawfully admitted aliens who had been convicted of aggravated felonies, and instead required the detention of all aliens convicted of aggravated felonies or certain other crimes. In September 1996, Con-

gress readopted those reforms by enacting Section 1226(c) as part of IIRIRA, thus again requiring the Attorney General to detain aliens who are removable because of serious criminal convictions, pending an administrative determination of their removability.

Congress did *not* require detention of all criminal aliens, however. In light of the practical restriction on the INS's ability to house detained criminal aliens (see S. Rep. No. 48, *supra*, at 21), Congress limited the mandatory detention remedy to criminal aliens who had committed crimes that Congress deemed especially serious because of their impact upon national security, public safety and welfare, and enforcement of the immigration laws. Section 1226(c) therefore requires mandatory detention pending removal following an alien's participation in terrorist activities or espionage (see 8 U.S.C. 1226(c)(1)(B) and (D)), commission of an aggravated felony (see 8 U.S.C. 1226(c)(1)(B)),[8] or commission of a specified controlled-substance offense, a firearms offense, or (under certain circumstances) crimes of moral turpitude (see 8 U.S.C. 1226(c)(1)(A), (B), and (C)).

[8] In a series of amendments, Congress expanded the INA's definition of "aggravated felony" (8 U.S.C. 1101(a)(43)), principally to include offenses that it found to underlie organized immigration crime. See citations at pp. 34-35, *infra*. The Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4320, amended the definition to include offenses relating to: firearms and explosive materials; theft; the demand or receipt of ransom; child pornography; racketeer influenced corrupt organizations; operation of prostitution businesses; peonage, slavery, and involuntary servitude; fraud; and document fraud. AEDPA further revised the aggravated felony definition by adding gambling offenses, transportation for the purpose of prostitution if committed for commercial advantage, forgery and counterfeiting, commercial bribery, unlawful trafficking in vehicles, obstruction of justice, perjury, and bribery of a witness. AEDPA § 440(e), 110 Stat. 1277-1278.

B. Congress's Determinations About The Necessity Of Mandatory Detention Are Judgments About Immigration Policy That Merit Particular Judicial Respect

This Court has long recognized that proceedings to expel aliens "would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation." *Wong Wing*, 163 U.S. at 235; see *Zadvydas* v. *Davis*, 533 U.S. 678, 699 (2001) (finding no basis for constitutional concern when detention of alien subject to final order of removal occurs within "a period reasonably necessary to secure removal"). The power to exclude or expel aliens is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). Because detention of removable aliens is an aspect of that exclusion and expulsion, it is largely "committed to the political branches of the Federal Government." *Reno* v. *Flores*, 507 U.S. 292, 305 (1993).

Thus, although congressional determinations underlying detention in aid of removal pursuant to the INA are not wholly beyond judicial review, "the judicial branch must defer to executive and legislative branch decisionmaking in that area." *Zadvydas*, 533 U.S. at 695. In particular, judicial review of Section 1226(c) "must take appropriate account of the greater immigration-related expertise of the [political] Branch[es], of the serious administrative needs and concerns inherent in the necessarily extensive INS efforts to enforce this complex statute, and the Nation's need to 'speak with one voice' in immigration matters." *Id.* at 700.

Against this background, the court of appeals was wrong to override Congress's determination that mandatory detention of criminal aliens who are subject to Section 1226(c) is

necessary to accomplish important immigration objectives (see Pet. App. 12a-21a), and then to order, for permanent resident aliens (see *id.* at 30a), a return to the same discretionary-release system that Congress found so deficient.[9]

1. The court of appeals was "not persuaded" that mandatory detention is necessary to ensure removal of the criminal aliens whom Congress has made subject to Section 1226(c), or sufficiently tailored to that objective. Pet. App. 13a. The court of appeals reasoned that a criminal alien subject to Section 1226(c) might not be removed at all if he obtains: (a) a determination that he is not removable under the INA; (b) discretionary cancellation of his removal under 8 U.S.C. 1182 (1994) and *INS* v. *St. Cyr*, 533 U.S. 289 (2001); or (c) withholding of removal under 8 U.S.C. 1231(b)(3) in order to protect the alien against possible persecution in his home country. In the court of appeals' view, the possibility that removal proceedings might be resolved in the alien's favor on one of those grounds, together with the fact that some aliens who are released from custody will appear for their removal proceedings and for removal if it is ordered, render mandatory detention impermissibly over-broad as a response to the problem of flight by permanent resident aliens who have committed one of the predicate crimes. See Pet. App. 13a-16a. The court of appeals' analysis is severely flawed.

[9] In addition to its "substantive" due process analysis, the court of appeals undertook a short and essentially repetitive "procedural" due process analysis. See Pet. App. 48a-50a. As the Fourth Circuit has explained, a criminal alien's procedural due process challenge to denial of a bond hearing in accordance with Section 1226(c) "collapses into" a substantive due process challenge to the requirement of mandatory detention under Section 1226(c). *Welch* v. *Ashcroft*, 293 F.3d 213, 218 n.4 (4th Cir. 2002). For the same reasons discussed below within the framework of substantive due process, respondent has no procedural due process right to a bond hearing: The government's interests in detention during removal proceedings and the government's inability to prevent flight by aliens through individualized bond hearings outweigh respondent's interest in release from custody during his removal proceedings. See *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

a. In the first place, the court of appeals ignored that mandatory detention under Section 1226(c) ensures not only a criminal alien's availability for removal if it is ordered, but also, in every case, the criminal alien's availability for *removal proceedings*. Evidence before Congress showed that criminal aliens who were not in custody had a flight rate of 20 to 42% from deportation proceedings (in addition to non-detained aliens' extraordinary flight rate of approximately 90% from actual deportation). See p. 19, *supra*. Congress could reasonably determine that the discretionary release system unacceptably undermined immigration enforcement when, in any group of five deportable criminal aliens, one or two predictably would abscond from their deportation proceedings. See *Richardson* v. *Reno*, 180 F.3d 1311, 1318 (11th Cir. 1999) ("The relationship of detention to removal proceedings is underscored by congressional findings that criminal aliens, with great regularity, fail to show for their immigration proceedings.") (citing S. Rep. No. 48, *supra*), cert. denied, 529 U.S. 1036 (2000). Indeed, that legislative determination rests upon a policy judgment about the sufficiency of particular removal procedures that is entitled to the utmost deference by the courts. Cf. *Zadvydas*, 533 U.S. at 695 (indicating that challenge to INS detention would not be justiciable if relief entailed "'sufferance of aliens' who should be removed" (quoting *id.* at 703 (Scalia, J., dissenting)) (internal quotation marks omitted)).

b. Quite aside from the court of appeals' failure to appreciate the importance of Section 1226(c) in securing a criminal alien's presence at his removal proceedings, the three hypothetical scenarios that the court of appeals relied

upon do not support the conclusion that mandatory detention under Section 1226(c) violates due process.

Removability. The court of appeals noted (Pet. App. 14a-15a) that the alien might be able to persuade the immigration judge that he is not removable from the United States, for instance because his crime is not one that requires removal. In the case of criminal aliens who are subject to mandatory detention, however, the fact of removability ordinarily will be established, beyond dispute, by the alien's judgment of conviction. In this case, for example, respondent has conceded that, based upon his 1997 conviction, he is removable as an aggravated felon and therefore is subject to detention under Section 1226(c). See Br. in Opp. 1-2; J.A. 8-9.

The court of appeals also overlooked that aliens may raise key issues concerning their removability in a challenge to detention under Section 1226(c). A person in INS custody who disputes that he is subject to mandatory detention may do so in a bond determination proceeding before the INS district director and in a subsequent bond redetermination hearing before an immigration judge. See 8 C.F.R. 3.19(a), (b), and (h)(2)(ii); 8 C.F.R. 236.1(c)(10) and (d)(1); *In re Joseph*, 22 I. & N. Dec. 799, 805, 1999 WL 339053, at *5 (BIA 1999). An adverse decision by an immigration judge may be appealed to the Board of Immigration Appeals (BIA). See 8 C.F.R. 236.1(d)(3). Thus, if a criminal alien in mandatory detention raises an issue such as whether he is a United States citizen, whether he actually was convicted of an offense, or whether his conviction is for an offense that triggers removal proceedings and mandatory detention under Section 1226(c)(1)—and if the alien can show that the INS is "substantially unlikely" to prevail on its underlying charge of removability—Section 1226(c) will not apply to the alien and the alien will be eligible for discretionary release while his

claims are resolved in the removal proceeding. *In re Joseph*, 22 I. & N. Dec. at 806, 1999 WL 339053, at *6-7.

Discretionary Relief from Removal. In IIRIRA, Congress rendered aliens who have been convicted of aggravated felonies ineligible for the discretionary relief of asylum and cancellation of removal. See 8 U.S.C. 1158(b)(2), 1229b. The court of appeals observed (Pet. App. 14a) that under this Court's decision in *St. Cyr*, some aggravated felons who pleaded guilty before the 1996 amendments to the INA are eligible for discretionary relief from removal under 8 U.S.C. 1182 (1994), which Congress repealed in 1996. But that possible avenue to discretionary relief for some aliens does not render mandatory detention under Section 1226(c) unconstitutional.

An alien who is seeking discretionary relief from removal has no claim to be free from mandatory detention on that basis. A grant of wholly discretionary relief is "not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). Such relief is accorded pursuant to the Attorney General's "unfettered discretion," and is akin to "a judge's power to suspend the execution of a sentence, or the President's power to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (internal quotation marks omitted). An alien (like a citizen) has no constitutionally protected interest in obtaining such relief. *Olim* v. *Wakinekona*, 461 U.S. 238, 249 (1983); see *Tefel* v. *Reno*, 180 F.3d 1286, 1300-1301 (11th Cir. 1999) (alien lacks protected liberty or property interest in grant of suspension of deportation), cert. denied, 530 U.S. 1228 (2000). Thus, a removable alien who is detained while the Attorney General's delegates consider his application for discretionary relief is properly treated as removable unless and until a decision to award discretionary relief is made, at which time mandatory detention under Section 1226(c) would cease.

The court of appeals also overstated (Pet. App. 14a) *St. Cyr*'s significance for a due process analysis of Section 1226(c). This Court held in *St. Cyr* that Congress's elimination of the possibility of a discretionary waiver of deportation under 8 U.S.C. 1182(c) (1994) does not apply retroactively to aliens who pleaded guilty before the effective date of that repeal and who would have been eligible for a discretionary waiver of deportation, despite their convictions, at the time of their criminal plea. 533 U.S. at 314-326. Even before Congress repealed 8 U.S.C. 1182(c) (1994), however, aggravated felons who had served a sentence of more than five years were ineligible for relief under that section. *St. Cyr* therefore allows an alien to seek discretionary relief from deportation on account of a conviction for which the alien entered a guilty plea before April 24, 1996, but only if the alien is a lawful permanent resident who did not serve an aggravated felony sentence of more than five years. See 67 Fed. Reg. 52,627, 52,628-52,629 (Aug. 13, 2002) (discussing proposed Justice Department rule implementing *St. Cyr*); 8 U.S.C. 1182(c) (1994).

At the present time and in the future, an alien who is taken into INS custody under Section 1226(c) upon release from his criminal sentence will have served more than five years of imprisonment following any guilty plea covered by *St. Cyr* (which must have been entered before April 1996, see 67 Fed. Reg. at 52,629).[10] Thus, *St. Cyr* applies to few aggravated felons who became subject to detention under Section 1226(c) after April 2001. Respondent, who pleaded guilty to his aggravated felony offense in April 1997, is

[10] The Attorney General is required to take aliens subject to mandatory detention under Section 1226(c) into detention when they are released from penal custody. 8 U.S.C. 1226(c)(1).

among the many criminal aliens not eligible to make a *St. Cyr* claim for discretionary relief.[11]

Withholding of Removal. Finally, the court of appeals relied (Pet. App. 13a-14a) upon the fact that not all aliens who have committed a criminal offense that triggers mandatory detention during removal proceedings are ineligible for withholding of removal. Withholding of removal protects an alien from removal to his home country if the Attorney General determines that the "alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). Unlike asylum, withholding of removal is a mandatory rather than discretionary form of protection from removal. The alien, however, bears the burden of demonstrating a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 419-420 (1999) (discussing relationship between asylum and withholding of removal); 8 C.F.R. 208.16(b). The possibility that an alien ultimately might carry that burden does not render unconstitutional mandatory detention in the meantime—*i.e.*, when the alien has *not* proved his eligibility for withholding of removal.

Moreover, withholding of removal is country-specific and does not prevent the INS from removing the alien to another country where he would not be persecuted. See 8 U.S.C. 1231(b)(3)(A). The premise of that protection is not that the alien has an entitlement to avoid removal from the United States, but rather that he should not be removed to a particular country at that time. See 8 C.F.R. 208.16(f), 208.22.

[11] Respondent was convicted in California Superior Court on April 23, 1997, and sentenced on October 8, 1997. See C.A. E.R. 6, 7. The court of appeals' opinion incorrectly states (Pet. App. 2a) that respondent was convicted in August 1997.

Furthermore, many criminal aliens held under Section 1226(c) are statutorily disqualified from receiving withholding of removal because they have committed a "particularly serious crime" such as an aggravated felony for which a sentence of at least five years' imprisonment was imposed. See 8 U.S.C. 1231(b)(3)(B). Finally, withholding of removal is rarely granted. The Executive Office for Immigration Review in the Department of Justice advises that in fiscal year 2001, its immigration judges decided 47,513 cases (involving both criminal and non-criminal aliens) in which a claim for asylum or withholding of removal was filed, and withholding of removal was granted in only 3,450 of those cases, or approximately seven percent.[12]

c. More broadly, and contrary to the court of appeals' reasoning (Pet. App. 13a-15a), the correlation between an alien's likely removal and a risk of flight highlights the particular appropriateness of mandatory detention in the context of an aggravated felon. Through IIRIRA, Congress expedited the removal of aggravated felons, and made them wholly ineligible for discretionary relief from removal. See 8 U.S.C. 1158(b) (asylum), 1229b (cancellation of removal). Thus, aggravated felons are particularly likely to be ordered removed from the United States. Indeed, because aggravated felons (with the limited exception of those covered by *St. Cyr*) are no longer entitled to seek the discretionary relief that had been available before 1996, the flight rates from deportation proceedings that Congress identified during its consideration of the 1996 immigration reforms

[12] In respondent's case, South Korea is not a country for which applications for protection from removal are often granted. Compare INS, *Refugees, Asylees, Fiscal Year 2000* Table 26 <http://www.ins.usdoj.gov/graphics/aboutins/statistics/00yrbk_REF/RA2000.pdf> (asylum awards) with INS, *Enforcement, Fiscal Year 2000* Table 66 <http://www.ins.usdoj.gov/graphics/aboutins/statistics/00yrbk_ENF_REV/ENF2000.pdf> (removals).

likely understate the current probability that an aggravated felon would abscond if not detained.

2. The court of appeals also determined (Pet. App. 16a-21a) that protecting the public against recidivism by criminal aliens is not a sufficient justification for mandatory detention under Section 1226(c). Looking to cases involving civil detention outside the immigration area (see *id.* at 17a-18a), the court of appeals concluded that the correct test is whether Section 1226(c) "is narrowly tailored to people who pose an unusual and well-defined danger to the public" (*id.* at 17a). The court was of the view that Section 1226(c) does not satisfy that test, because "[g]iven the range of crimes qualifying as aggravated felonies, the government simply cannot show that § 1226(c) covers only aliens who pose an especially serious danger to the public." *Id.* at 20a; accord *Hoang* v. *Comfort*, 282 F.3d 1247, 1260 (10th Cir. 2002), petition for cert. pending, No. 01-1616 (filed May 3, 2002).

a. The court of appeals gave no weight in its analysis to the immigration context in which this case arises. Because of Congress's broad powers over immigration and the distinct status of aliens while they are in this country, detention of aliens can be within Congress's "broad power over immigration and naturalization"—and therefore permissible under the Constitution—even if detention of a citizen would be impermissible under the same circumstances. *Flores*, 507 U.S. at 305-306 (quoting *Fiallo*, 430 U.S. at 792). Thus, in *Flores*, the Court held that "any doubts as to the [facial] constitutionality of institutional custody over unaccompanied juveniles" who were suspected of being deportable was eliminated by the fact that most of the juveniles subject to detention were aliens. *Id.* at 305. The detainees' status as non-citizens, and the detention's relationship to immigration policy, dictated "unexacting" rational-basis review. *Id.* at 306; see *Welch* v. *Ashcroft*, 293 F.3d 213, 222 (4th Cir. 2002) (detention under Section 1226(c)

comports with substantive due process if it is reasonably related to legitimate government interests and non-punitive).[13]

Categorical rules about which aliens should be admitted to or removed from the United States, and about the timing and terms of such admission or removal, are a pervasive and necessary feature of immigration law. Accordingly, categorical legislative judgments are particularly permissible when Congress exercises its plenary authority over immigration. See *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982) ("Congress has developed a complex scheme governing admission to our Nation and status within our borders. * * * The obvious

[13] The Court need not choose between the rational-basis test of *Flores* and stricter tests such as the "special justification" rule applied by the court of appeals in this case (see Pet. App. 12a). Nor is it necessary to resolve the disagreement among the courts of appeals as to whether detention of permanent resident aliens pending the outcome of their removal proceedings implicates a fundamental right. Compare *Patel* v. *Zemski*, 275 F.3d 299, 309- 310 (3d Cir. 2001) (finding fundamental right) and *Hoang*, 282 F.3d at 1257-1258 (same), petition for cert. pending, No. 01-1616 (filed May 3, 2002), with *Welch*, 293 F.3d at 220-222 (no fundamental right) and *Parra* v. *Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) (same). Whatever standard of review is applicable in this case, it should be applied with regard for the political Branches' plenary authority over matters of immigration policy. See *Rostker* v. *Goldberg*, 453 U.S. 57, 64-72 (1981) (rejecting government's argument for rational-basis review in equal protection challenge to draft-registration law, but stating that deference nevertheless must be given to Congress' decisions about military affairs); see also *Weiss* v. *United States*, 510 U.S. 163, 177-178 (1994) (military context affects due process analysis). In these circumstances, deference principles require essentially the same analysis as the rational-basis standard that this Court applied in *Flores*. In *Zadvydas*, by contrast, the detention that this Court found constitutionally problematic occurred after removal from the United States was "no longer practically attainable," and the detention therefore did not "bear[] [a] reasonable relation" to implementation of any congressional immigration policy. 533 U.S. at 690.

need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field."); *Mathews* v. *Diaz*, 426 U.S. 67, 77-84 (1976).

For example, a permanent resident alien who is personally loyal to the United States nevertheless may be expelled if his nation becomes an enemy of the United States. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587 (1952). And nationality is a permissible basis for drawing immigration-related distinctions among aliens who are lawfully in this country, so long as the distinctions are not wholly irrational. See, *e.g.*, *Narenji* v. *Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (upholding registration requirements for Iranian students), cert. denied, 446 U.S. 957 (1980).

In the detention context, this Court has upheld the drawing of categorical conclusions about a deportable alien's dangerousness from the alien's participation in Communist activities. *Carlson* v. *Landon*, 342 U.S. 524, 541-542 (1952). In *Carlson*, the Court rejected the dissent's argument that a "general practice of denying bail to all active Communists" was impermissible, and that "[t]hese persons should have the benefit of an exercise of discretion by the Attorney General, freed from any conception that Congress had made them in effect unbailable." *Id.* at 559, 568 (Frankfurter, J., dissenting). Similarly, the detention upheld in *Flores* was based "upon a 'blanket' presumption of the unsuitability of custodians other than parents, close relatives, and guardians," yet this Court held that such "reasonable presumptions and generic rules" were permissible even when made by the INS rather than Congress itself. 507 U.S. at 313.

b. In this case, the court of appeals afforded Congress's categorical judgments no deference at all. Instead, the court relied upon its own view (Pet. App. 20a) that some of the crimes within the INA's definition of "aggravated felony" (8 U.S.C. 1101(a)(43))—including possession of a firearm by a felon, involuntary manslaughter constituting a "crime of

violence" under 18 U.S.C. 16, and counterfeiting[14]—do not indicate an "especially serious danger to the public." The court of appeals appears to have concluded (Pet. App. 4a) that only an alien's conviction of a violent crime that facially endangers "physical safety" can support mandatory detention.

Congress made a different judgment. It deemed all crimes within the INA's definition of "aggravated felony" to be particularly serious when committed by an alien, because such crimes are integral to international terrorism, drug trafficking, and organized immigration crime, which *do* threaten physical (and other) harms. See, *e.g.*, *1994 House Hearing*, *supra*, at 124, 125, 181 (connecting visa and passport fraud to terrorism and drug-trafficking); *1989 House Hearing*, *supra*, at 18 (statement of Jack Shaw, Assistant Commissioner, INS) (listing immigration fraud, along with crimes of violence and drug smuggling, as "activity [that] represents the greatest threat to public safety"), 26 (racketeering is "major law enforcement problem[] involving aliens").

Congress was especially intent upon addressing the harms associated with alien smuggling and related offenses. See H.R. Rep. No. 22, *supra*, at 7-8 (discussing alien smuggling rings and their involvement in other crimes); H.R. Rep. No. 469, *supra*, Pt. 1, at 116 ("Alien smuggling is often linked to other crimes, such as drug smuggling and trafficking, prostitution, racketeering, and severe labor law violations."); Testimony of Doris Meissner, *supra*, 1995 WL 110438 (organized immigration rings engage in criminal activities and enterprises including counterfeiting, illegal acquisition of firearms and explosives, narcotics smuggling and trafficking, money laundering, and racketeering activity such as extortion, bribery, obstruction of investigation by violence, and financial fraud); *1989 House Hearing*, *supra*, at 36 (statement of Jack Shaw) (discussing crimes of alien smuggling rings), 44 (same). As Representative McCollum of Florida explained, aliens in organized crime rings "extort large sums from * * * illegal immigrants in return for passage to the United States and for the fraudulent documents they need to obtain entry. In many cases, these illegal immigrants * * * are forced into involuntary servitude, prostitution, and other crimes in order to repay these fees. In some cases * * *, the attempt to smuggle these illegals goes tragically wrong and people die." 141 Cong. Rec. 4394 (1995). Representative Kennedy likened alien-smuggling to the "slave trade." *Id.* at 4395-4396; see H.R. Rep. No. 469, *supra*, Pt. 1, at 117 ("many smuggled aliens are victims, more than beneficiaries," of alien smuggling). Congress thus reasonably determined that smuggling-related crimes are "serious crimes that threaten public safety and national security." H.R. Rep. No. 469, *supra*, Pt. 1, at 107.

[14] See cases cited at Pet. App. 20a; see also 8 U.S.C. 1101(a)(43)(E)(ii), (F), and (R).

c. The court of appeals also expressed the view that "the fact of a prior conviction alone * * * can be unreliable evidence of dangerousness." Pet. App. 20a. But there is nothing unusual or constitutionally suspect about basing a prediction of future dangerousness upon a past criminal conviction. See *Zadvydas*, 533 U.S. at 714 (Kennedy, J., dissenting) ("Aliens ordered deported as the result of having committed a felony have proved to be dangerous."); *Kansas* v. *Hendricks*, 521 U.S. 346, 358 (1997) ("[P]revious instances of violent behavior are an important indicator of future violent tendencies.") (internal quotation marks omitted). Congress, moreover, identified a repeat arrest rate for criminal aliens of approximately 40% within one year of release from prison, and noted that approximately 80% of criminal aliens have multiple arrests. See p. 17, *supra*.

In this case, the permissibility of Congress's categorical determination that respondent's convictions are sufficient to terminate his permanent resident status and render him removable is unchallenged. Congress was equally entitled to determine on a categorical basis that respondent's criminal history warrants effective steps to guarantee that he will not harm the United States—through criminal recidivism or by flouting the sovereign right of removal—before the statutory removal requirement can be implemented.

3. The court of appeals found support for its decision in "doubt" expressed by the Commissioner of the INS "about whether no-bail civil detention is a desirable—let alone a necessary—means of dealing with aliens subject to removal proceedings." Pet. App. 21a; see *id.* at 21a-22a. Congress was fully aware in 1996 of the INS's preference for a detention regime that vested the Attorney General (and hence the INS) with broad discretion. See, *e.g.*, Testimony of David A. Martin, *supra*, 1996 WL 502071 (arguing after AEDPA's amendments to Section 242 that "a better enforcement strategy would restore at least some of the flexibility previously granted to the Attorney General"); *1993 Senate Hearing*, *supra*, at 100 (Justice Department opposition to mandatory detention). But the INS's principal reason was that mandatory detention would quickly fill INS detention space—not that mandatory detention would be ineffective. Testimony of David A. Martin, *supra*, 1996 WL 502071; see *1993 Senate Hearing*, *supra*, at 55 (mandatory detention of additional criminal aliens would "substantially impact our limited detention capability"). The INS stressed the direct connection between detention of criminal aliens, their successful removal from the United States, and effective enforcement of the immigration laws. Testimony of David A. Martin, *supra*, 1996 WL 502071 ("[I]ncreased detention space does much more than ensure the removal of a given alien. It also helps restore the overall credibility of the

deportation process."); see *1989 House Hearing*, *supra*, at 22-23 (testimony of Jack Shaw, Assistant Commissioner, INS) ("[T]he limitations on our detention capacity directly impact our ability to effectively remove the alien from the country.").

When it enacted Section 1226(c), Congress rejected the INS's view that discretionary detention of criminal aliens should be favored over mandatory detention. But Congress accommodated the INS's immediate pragmatic concern about detaining additional criminal aliens pending deportation. IIRIRA provided the Attorney General the option of invoking, for a period of up to two years, transitional custody rules that delayed certain expansions of the class of removable criminal aliens subject to mandatory detention, and allowed the Attorney General to release criminal aliens who were not aggravated felons if he determined that they would not present a danger to the safety of other persons or property and would be likely to appear for their removal proceedings. See IIRIRA § 303(b) (*reprinted in* 8 U.S.C. 1226(c) note). The Attorney General could (and did) trigger the transitional rules by certifying that there were insufficient detention space and INS personnel to implement Section 1226(c), but the mandatory detention provisions of Section 1226(c) thereafter became effective in October 1998. See IIRIRA § 303(b)(2) (*reprinted in* 8 U.S.C. 1226 note).

Congress thus was resolute that mandatory detention of the criminal aliens described in 8 U.S.C. 1226(c), rather than a regime allowing discretionary release, is necessary. Congress's decision to commit itself to new spending for the detention facilities and staff needed to institute mandatory detention highlights Congress's conviction that the discretionary detention policy in place until 1988 and during the early 1990s had failed. A 1993 report by the staff of the Senate Governmental Affairs Committee captures Congress's view: The Committee staff acknowledged that "[t]he

detention option is problematical" because "INS has limited detention space and * * * funds for detention," but it nevertheless determined that "[r]elease on bond * * * is even more of a problem since our investigation has found that large numbers of non-detained criminal aliens abscond and fail to appear for their deportation hearing." *1993 Senate Hearing*, *supra*, at 8.

C. *Zadvydas* Supports A Determination That Section 1226(c) Is Constitutional

The four courts of appeals that have held that Section 1226(c) violates due process in some applications cite this Court's decision in *Zadvydas* as support for their holdings. See Pet. App. 9a-12a, 23a, 26a; *Welch*, 293 F.3d at 224-227, 228 (Widener, J., concurring), 228-236 (Williams, J., concurring in the judgment); *Hoang*, 282 F.3d at 1255-1259; *Patel* v. *Zemski*, 275 F.3d 299, 309-310, 313 (3d Cir. 2001). In fact, however, *Zadvydas* supports the constitutionality of Section 1226(c).

The critical fact in *Zadvydas*, which the Court found to justify interpreting 8 U.S.C. 1231(a) to limit the duration of detention of two permanent resident aliens who were subject to final removal orders, was that Section 1231(a) otherwise would have authorized "indefinite, perhaps permanent, detention." 533 U.S. at 699; see *id.* at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."). The Court eliminated that constitutional doubt by construing 8 U.S.C. 1231(a)(6) to authorize detention of the alien, after entry of a final removal order, only as long as removal is reasonably foreseeable. 533 U.S. at 699.[15]

[15] This Court held in *Zadvydas* that the detention authorized by Section 1231(a) is civil, and "assume[d]" for purposes of its due process analysis that the detention is "nonpunitive in purpose and effect." 533 U.S. at 690. As the court of appeals in this case correctly held (Pet. App. 12a), the detention required by Section 1226(c) likewise is civil and regulatory rather than criminal and punitive. Accord *Patel*, 275 F.3d at 310-311; *Hoang*, 282 F.3d at 1258-1259; see *Welch*, 293 F.3d at 222-224 (Section 1226(c) not punitive on its face); see also *Carlson*, 342 U.S. at 537-538 ("Deportation is not a criminal proceeding and has never been held to be punishment.").

Section 1226(c) does not raise a similar constitutional concern. In Section 1226(c) Congress itself specified an "obvious termination point" (533 U.S. at 697) for detention, because the provision applies only during the pendency of the alien's removal proceedings. The Court in *Zadvydas* expressly distinguished detention under Section 1226(c) from detention under Section 1231(a)(6) on precisely that basis. *Ibid.* ("[P]ost-removal-period detention, *unlike detention pending a determination of removability* * * *, has no obvious termination point.") (emphasis added).[16]

The actual implementation of Section 1226(c) reinforces this fundamental statutory difference. The Executive Office for Immigration Review has calculated that, in cases where the alien is charged with being removable on grounds that trigger mandatory detention under Section 1226(c), its immigration judges complete removal proceedings in an average time of 47 days and a median time of 30 days—both far below the six-month period that this Court determined was presumptively reasonable for detention after a final order of

[16] Similarly, and contrary to the opinion of the court of appeals (Pet. App. 22a-23a), there is no logical inconsistency between the mandatory detention requirement of Section 1226(c) and 8 U.S.C. 1231(a)(6), which gives the Attorney General discretionary authority, after the expiration of the statutory 90-day removal period, to release a criminal alien who is subject to a final order of removal but who has not yet been removed. The possibility of discretionary release after the end of the post-order removal period serves to address the possibility of an indefinite and unavoidable delay in removal, which has no analog when an alien is detained under Section 1226(c) during his administrative removal proceedings.

removal.[17] See *Zadvydas*, 533 U.S. at 701. In approximately 85% of the cases, the immigration judge's decision is not appealed to the BIA and becomes a final decision, and the alien thereafter would be detained (if ordered removed) under 8 U.S.C. 1231(a) rather than under Section 1226(c). In the relatively small percentage of cases that are appealed to the BIA, the average time required for disposition of the appeal—from the filing of the appeal through the BIA's issuance of its decision—is approximately four months. The median time is slightly shorter (114 days).[18] Accordingly, detention during the pendency of removal proceedings cannot fairly be compared to the "indefinite, perhaps permanent, detention" (533 U.S. at 699) of aliens that raised a constitutional concern in *Zadvydas*.

Other aspects of *Zadvydas* further support the constitutionality of Section 1226(c). The Court's constitutional concern about indefinite detention under Section 1231(a)(6) arose in part from the possibility of detention "where detention's goal"—removal from the United States—"is no longer practically attainable." 533 U.S. at 690; see *id.* at 699 ("[I]nterpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer author-

[17] The processing times given for proceedings before an immigration judge reflect the amount of time between the docketing of the INS's charging document and the issuance of an appealable decision by an immigration judge, for cases completed in fiscal year 2001. They do not apply to cases adjudicated by an immigration judge while the alien is still in criminal custody. In that situation, the alien is not detained by the INS pursuant to Section 1226(c). See 8 U.S.C. 1228(a).

[18] Moreover, the BIA has recently established a streamlined appeal process that is expected to reduce further the length of time that cases are pending before that body. See 8 C.F.R. 3.1(a)(7) (allowing affirmance by single Board member without opinion where three-judge review is not warranted).

ized by statute."). Because detention under Section 1226(c) is limited to the period when the alien is in removal proceedings, it *always* serves the purpose of ensuring a criminal alien's appearance at removal proceedings, as well as the alien's availability for removal at the end of those proceedings if (as is very likely) a final order of removal is entered. Section 1226(c) thus is analogous to post-order detention while removal is reasonably foreseeable, which this Court found free from constitutional doubt in *Zadvydas*.

Relatedly, *Zadvydas* indicates that the risk of flight from immigration proceedings constitutes a "sufficiently strong special justification" for detention when there is a "reasonable relation" between the detention and its purpose. 533 U.S. at 690 (internal quotation marks omitted); cf. *Flores*, 507 U.S. at 306 (testing deportation-related detention under "the (unexacting) standard of rationally advancing some legitimate governmental purpose"). The evidence compiled by Congress about criminal aliens' 20-42% flight rate from deportation proceedings under the discretionary-release regime, and the approximately 90% flight rate of non-detained aliens from actual deportation (see p. 19, *supra*), firmly establishes a "reasonable relation" between mandatory detention and the removal of criminal aliens pursuant to the requirements of the INA.

Likewise, the Court indicated in *Zadvydas* that an alien's dangerousness suffices to justify detention when it is "limited to specially dangerous individuals and subject to strong procedural protections." 533 U.S. at 691; see *id.* at 721 (Kennedy, J., dissenting) (satisfaction of due process requirements depends upon procedures available to aliens). Congress included in the list of deportable aliens subject to mandatory detention under Section 1226(c) only a subset of aliens who committed crimes that Congress deemed especially serious. For those aliens, moreover, the predicate for the determination of dangerousness, like the predicate for

their removability, is a conviction that was obtained in court with full criminal process.[19] See *Welch*, 293 F.3d at 223-224 ("[P]rior convictions as a basis for regulatory detention require fewer due process safeguards" because, "unlike virtually any other consideration used to enlarge the possible deprivation[,] . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.") (quoting *Jones* v. *United States*, 526 U.S. 227, 249 (1999)) (brackets omitted); S. Rep. No. 48, *supra*, at 3 ("[C]riminal aliens have already been afforded all the substantial due process required under our system of criminal justice before being convicted beyond a reasonable doubt of a felony."). In these respects as well, *Zadvydas* supports the constitutionality of mandatory detention under Section 1226(c).

II. SECTION 1226(C) DOES NOT IN ANY EVENT VIOLATE DUE PROCESS ON ITS FACE

Respondent's habeas corpus petition presented only a facial due process challenge to 8 U.S.C. 1226(c) (Pet. App. 33a; J.A. 9-10), and the district court held that the law is "unconstitutional on its face." Pet. App. 50a. The court of appeals did not affirm that aspect of the district court's decision. Instead, the court of appeals stressed (*id.* at 5a-6a) that it was not considering the constitutionality of mandatory detention of aliens stopped at the border, who have not been admitted into the United States. Nevertheless, the court of appeals held that Section 1226(c) is unconstitutional as applied to respondent and, more broadly, that due process requires that lawful permanent residents who are subject to

[19] As discussed (see pp. 26-27, *supra*), a detained alien who disputes the existence of a predicate criminal conviction in his case may seek release from detention on that basis. Cf. *Zadvydas*, 533 U.S. at 722-723 (Kennedy, J., dissenting) (discussing regulatory procedures that protect alien held under Section 1231(a)(6)).

mandatory detention under Section 1226(c) must be given "a bail hearing with reasonable promptness to determine whether the alien is a flight risk or a danger to the community." *Id.* at 6a, 30a.

The court of appeals was correct to reject respondent's assertion that Section 1226(c) can *never* be constitutionally applied to detain an alien without a bond hearing during his removal proceeding. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is * * * the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). But the court was wrong to extend its (incorrect) holding on the facts of this case categorically to a whole class of aliens. Indeed, even if it were assumed for purposes of argument that Section 1226(c) may not be applied to respondent on the particular facts of this case, the law still would be enforceable against many thousands of criminal aliens.[20]

[20] The Seventh Circuit in *Parra*, 172 F.3d 954, rejected a due process challenge to Section 1226(c) where the alien (a lawful permanent resident) conceded his removability. The Tenth Circuit, like the Ninth Circuit, has held Section 1226(c) unconstitutional as applied to lawful permanent residents, but the law's constitutionality as applied to other groups of criminal aliens in that circuit is uncertain. See *Hoang*, 282 F.3d at 1261. In the Third Circuit, Section 1226(c) has been held unconstitutional as applied to both a lawful permanent resident alien (see *Patel*, 275 F.3d 299) and an alien who entered the United States without inspection and who remained in the United States unlawfully (see *Radoncic* v. *Zemski*, 28 Fed. Appx. 113 (2002), petition for cert. pending, No. 01-1459 (filed Apr. 4, 2002)). In *Welch*, the Fourth Circuit rejected a facial challenge to Section 1226(c) and instead undertook a case-specific inquiry into whether mandatory detention "based on a record of prior criminal conduct is a reasonable and not excessive way to prevent flight risk and to protect the community." 293 F.3d at 223, 224-228. A majority of the Fourth Circuit panel concluded that the alien in that case, having been detained for more than six months, was entitled to release unless entry of a final order of removal

A. Aliens Detained At The United States Border Have No Due Process Right To Avoid Detention, And Aliens Who Enter Or Remain Illegally Have A Diminished Due Process Claim

The court of appeals itself highlighted one situation in which mandatory detention is manifestly permissible: that of an alien who has been stopped at the border and has not entered the United States. As this Court observed in *Zadvydas*, detention of "[a]liens who have not yet gained initial admission to this country * * * present[s] a very different question" from detention of lawful permanent resident aliens like respondent and the two aliens in *Zadvydas*. 533 U.S. at 682; see *id.* at 692-694 (distinguishing *Mezei*). As the Court held in *Mezei* and reaffirmed in *Zadvydas*, due process protections do not apply to aliens at the border. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S. at 212 (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)); see *Zadvydas*, 533 U.S. at 692-693. Furthermore, detention of aliens who are stopped at the border effectuates the political Branches' power to prevent those aliens' unlawful entry and physical presence in the United States in the first place.[21] See *Fiallo*, 430 U.S. at 792; *Mezei*, 345 U.S. at 210, 215-216. Respondent

(or actual removal) was reasonably likely in the foreseeable future. See 293 F.3d at 228 (Widener, J., concurring), 234-235 (Williams, J., concurring in the judgment).

[21] This is true even of aliens who are physically present in the United States on immigration parole, which is not an admission to the country. See 8 U.S.C. 1182(d)(5)(A) ("parole * * * shall not be regarded as an admission of the alien"); 8 U.S.C. 1101(a)(13)(B) (alien who is paroled "shall not be considered to have been admitted"); *Mezei*, 345 U.S. at 215 (alien's "harborage" on land, as an act of "legislative grace," conferred no additional rights); *Leng May Ma* v. *Barber*, 357 U.S. 185, 190 (1958) (parole of aliens seeking admission to United States is not admission).

himself appears to accept that Section 1226(c) satisfies due process as applied to an alien who is stopped at the United States border. See Br. in Opp. 15.

Aliens who enter the United States illegally or do not comply with the terms of their visa also have a far weaker claim to due process protection as a general matter than permanent resident aliens.[22] As the Court noted in *Zadvydas*, the due process protection to which a removable alien is constitutionally entitled "may vary depending upon [the alien's] status and circumstance." 533 U.S. at 694; see *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."). Aliens who are present in the United States in violation of law are removable for that reason alone. See 8 U.S.C. 1227(a)(1)(B). Because illegal aliens' presence in this country is unlawful, the necessarily limited associations, rights, and responsibilities that they accumulate during their unlawful presence convey only the most attenuated entitlement to constitutional protection. Furthermore, it is particularly doubtful that an alien who is in the United States illegally, and who commits additional crimes during his unlawful stay, could be considered likely to obey the requirements of the law if released into the community, or to be likely to appear voluntarily for removal proceedings. Section 1226(c) therefore is especially justified as applied to this group of aliens, as well.[23]

[22] Aliens who enter the United States illegally or who overstay their permission to be in this country might be compared to common-law trespassers, to whom the landowner—here, by analogy, the United States—owes no duty of care. See Restatement (Second) of Torts §§ 329, 333 (1965).

[23] For these reasons, the Third Circuit was clearly wrong when it held that "the legal issue" of Section 1226(c)'s constitutionality as applied to an

B. Mandatory Detention During Removal Proceedings Is Particularly Permissible As Applied To Aliens For Whom There Is Not A Significant Likelihood Of Avoiding Removal

As explained above (pp. 24-30, *supra*), Section 1226(c) is not rendered unconstitutional by the theoretical possibility that a criminal alien might, as a result of the removal proceedings for which he is detained, be allowed to remain in the United States. Nevertheless, Section 1226(c) is especially defensible as applied to aliens who concede their removability, or for whom there is not a significant likelihood of succeeding in a challenge to removal. See *Parra*, 172 F.3d 954.

There is no constitutionally significant difference between detention during an administrative proceeding that assuredly will lead to a final order of removal, and detention to execute the final removal order—which this Court has stated is permissible. *Wong Wing*, 163 U.S. at 235; see *Zadvydas*, 533 U.S. at 683, 698-699. Furthermore, when an alien has no credible basis for avoiding removal, his removal proceedings will be straightforward and, therefore, are likely to be particularly speedy. Withdrawing all objections to removal and departing the United States also is a reasonable alternative, from the alien's perspective, to continuing with the removal proceeding and its associated detention. See S. Rep. No. 48, *supra*, at 19 ("A significant percentage of criminal alien deportations are of criminal aliens who do not contest their deportation and in many cases even wish to be deported."). Such an alien "has the keys in his pocket." *Parra*, 172 F.3d at 958. Similar considerations are present

---

alien who entered the United States without inspection "is the same" as in a case involving a permanent resident alien. *Radoncic*, 28 Fed. Appx. at 116.

any time an alien asserts a defense to removal that, while not frivolous, is unlikely to succeed.

C. Mandatory Detention Also Is Especially Warranted When The Alien Has Committed The Most Serious Crimes That Trigger Section 1226(c)

There are cases in which the nature of the alien's crime is alone sufficient to establish the permissibility of mandatory detention, without regard for the additional considerations of flight risk and immigration enforcement. That would be the case, for instance, when a terrorist is held pursuant to 8 U.S.C. 1226(c)(1)(D). See *Zadvydas*, 533 U.S. at 696 (noting that "terrorism or other special circumstances" may support "special arguments * * * for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."); *Carlson*, 342 U.S. at 541 (alleged participation in Communist activities sufficient for detention during removal proceedings). So too, a deportable murderer, rapist, or sexual abuser of a child who is placed in custody pursuant to 8 U.S.C. 1226(c)(1)(B) and 1101(a)(43)(A) could make only the most tenuous claim of a due process right to an individualized bond hearing. Along the same lines, the Fourth Circuit suggested in *Welch* that a constitutional line might be drawn between aggravated felons and criminal aliens who commit misdemeanor offenses that are not aggravated felonies but nonetheless trigger mandatory detention under 8 U.S.C. 1226(c)(1)(B) and 1227(a)(2). See 293 F.3d at 225-226; cf. 8 U.S.C. 1229b(a)(3) (prohibiting discretionary cancellation of removal for aggravated felons but not other permanent resident aliens with criminal convictions); IIRIRA § 303(b) (*reprinted in* 8 U.S.C. 1226 note) (transition rules allowing release of criminals who are not aggravated felons until INS developed detention capability to implement Section 1226(c)).

Such questions need not be addressed in this case, because of the deference due to *Congress's* determination of what crimes are sufficiently serious to warrant mandatory detention in the immigration context. Nevertheless, the applicability of Section 1226(c) to aliens who have committed the most egregious and threatening crimes highlights that Section 1226(c) is not facially invalid.

D. Section 1226(c) Could Not Be Held Unconstitutional Without Reference To The Duration Of The Alien's Detention

Zadvydas illustrates that the duration of detention in aid of removal is another factor bearing upon its constitutionality, because prolonged detention imposes a greater burden upon the alien and (depending upon the circumstances) may at some point not serve the underlying governmental purpose. See 533 U.S. at 688-701; see also *Salerno*, 481 U.S. at 747 (limitations on duration of pretrial detention indicate its reasonableness in relation to legitimate regulatory goal); *Schall* v. *Martin*, 467 U.S. 253, 269 (1984) (same). As already discussed, detention under Section 1226(c) generally lasts approximately one month or less, which distinguishes *Zadvydas* and strongly supports the statute's constitutionality. See pp. 39-40, *supra*.

In *Welch*, the Fourth Circuit relied upon the reasoning of *Zadvydas* to establish a rebuttable presumption that detention under Section 1226(c) for more than six months is unlawful. See 293 F.2d at 227, 228 (Widener, J., concurring), 234-235 (Williams, J., concurring in the judgment). That approach lacks a specific foundation in the text or history of Section 1226(c). Nevertheless, it does reinforce a critical point for purposes of respondent's facial challenge: The mandatory detention provisions of Section 1226(c) are constitutional in the ordinary case, and exceptional circumstances

that present special due process concerns can be addressed on a case-by-case basis.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

AUSTIN C. SCHLICK
Assistant to the Solicitor General

DONALD E. KEENER
MARK C. WALTERS
HUGH G. MULLANE
MICHELLE GORDEN
Attorneys

AUGUST 2002

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. Section 1226 of Title 8 of the United States Code provides in pertinent part:

> **Apprehension and detention of aliens**
>
> **(a) Arrest, Detention, and Release**
>
> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.
>
> * * * * *
>
> **(c) Detention of criminal aliens**
>
> **(1) Custody**
>
> The Attorney General shall take into custody any alien who—
>
> **(A)** is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> **(B)** is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

> **(C)** is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [*sic*] to a term of imprisonment of at least 1 year, or
>
> **(D)** is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

* * * * *

Footnote omitted.

(13)

No. 01-1491

Supreme Court, U.S.
FILED
OCT 28 2002
CLERK

In The
Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

HYUNG JOON KIM,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

LILIANA M. GARCES
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
405 14th Street, Suite 300
Oakland, California 94612

JAYASHRI SRIKANTIAH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
1663 Mission Street, Suite 460
San Francisco, California 94103

BRIAN CONDON
ARNOLD & PORTER
777 S. Figueroa Street, 44th Floor
Los Angeles, California 90017

JUDY RABINOVITZ
Counsel of Record
LUCAS GUTTENTAG
LEE GELERNT
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2618

A. STEPHEN HUT, JR.
CHRISTOPHER J. MEADE
GREGORY S. CHERNACK
KATHERINE A. FLEET
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

62 pp

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT	2
SUMMARY OF ARGUMENT	12
ARGUMENT	14
I. SECTION 1226(c) VIOLATES THE DUE PROCESS CLAUSE AS APPLIED TO LAWFUL PERMANENT RESIDENTS LIKE RESPONDENT	14
A. Section 1226(c) Violates Due Process Because It Prohibits Any Individualized Determination Of Danger Or Flight Risk...	16
B. Section 1226(c) Results In Prolonged Detention Of Lawful Permanent Residents Who Pose No Danger Or Flight Risk And Who Are Raising Bona Fide Challenges To Removal	25
C. The Government Has Not Shown That Individualized Bond Hearings Are Ineffective Or Burdensome	33
II. SECTION 1226(c) SHOULD BE CONSTRUED NOT TO APPLY TO RESPONDENT	40
A. In IIRIRA, Congress Chose To Require Mandatory Detention Only If An Alien "Is Deportable"	41
B. Under The Statute, An Alien "Is Deportable" Only After There Is A Final Order Of Deportation	43
CONCLUSION	50

TABLE OF AUTHORITIES

Page

CASES:

Abimbola v. Ashcroft, No. 01-CV-5568, 2002 WL 2003186 (E.D.N.Y. Aug. 28, 2002) 5

Addington v. Texas, 441 U.S. 418 (1979) 18

Agunobi v. Thornburgh, 745 F. Supp. 533 (N.D. Ill. 1990) 41

Alarcon, In re, 20 I. & N. Dec. 557 (BIA 1992) 3

Alvarado-Alvino, In re, 22 I. & N. Dec. 718 (BIA 1999) 30

Amaye v. Elwood, No. CV-01-2177, 2002 WL 1747540 (M.D. Pa. June 17, 2002) 5

Bahta, In re, 22 I. & N. Dec. 1381 (BIA 2000) 3

Bart, In re, 20 I. & N. Dec. 436 (BIA 1992) 3

Bazan-Reyes v. INS, 256 F.3d 600 (7th Cir. 2001) 30

Bennett v. Spear, 520 U.S. 154 (1997) 44, 48

Carlson v. Landon, 342 U.S. 524 (1952) ..... *passim*

Chowdhury v. INS, 249 F.3d 970 (9th Cir. 2001) 30

Crowell v. Benson, 285 U.S. 22 (1932) 44

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 40

Espinoza, In re, 22 I. & N. Dec. 889 (BIA 1999) 30

TABLE OF AUTHORITIES – Continued

Page

Fernandez-Santander v. Thornburgh, 751 F. Supp. 1007 (D. Me. 1990), *vacated and remanded without opinion*, 930 F.2d 906 (1st Cir. 1991) 41

Fiallo v. Bell, 430 U.S. 787 (1977) 22

Flores v. Meese, 942 F.2d 1352 (9th Cir. 1991) 20

Foti v. INS, 375 U.S. 217 (1963) 31

Foucha v. Louisiana, 504 U.S. 71 (1992) 12, 15, 18, 22

Francis v. Reno, 269 F.3d 162 (3d Cir. 2001) 30

Galvan v. Press, 347 U.S. 522 (1954) 22

Harisiades v. Shaughnessy, 342 U.S. 580 (1952) 22

Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002), *pet. for cert. pending*, No. 01-1616 11

INS v. Chadha, 462 U.S. 919 (1983) 22

INS v. St. Cyr, 533 U.S. 289 (2001) ..... *passim*

Jackson v. Indiana, 406 U.S. 715 (1972) 15, 17, 18

Jones v. United States, 526 U.S. 227 (1999) 21, 41

Joseph, In re, 22 I. & N. Dec. 799 (BIA 1999) 6, 31, 32, 48, 49

Kansas v. Hendricks, 521 U.S. 346 (1997) ..... *passim*

Kellman v. District Director, INS, 750 F. Supp. 625 (S.D.N.Y. 1990) 41

Landon v. Plasencia, 459 U.S. 21 (1982) 22, 25, 40

TABLE OF AUTHORITIES – Continued

Page

Leader v. Blackman, 744 F. Supp. 500 (S.D.N.Y. 1990) 41

Lok, In re, 18 I. & N. Dec. 101 (BIA 1981) 4, 33, 44

Martin, In re, 23 I. & N. Dec. 491 (BIA 2002) 3

Martinez-Recinos, In re, 23 I. & N. Dec. 175 (BIA 2001) 3

Mathews v. Eldridge, 424 U.S. 319 (1976) 40

Michel v. INS, 206 F.3d 253 (2d Cir. 2000) 3

Mogharrabi, In re, 19 I. & N. Dec. 439 (BIA 1987) 30

Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 40

Noble, In re, 21 I. & N. Dec. 672 (BIA 1997) 49

Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999) 11

Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001) 11

Perez, In re, 22 I. & N. Dec. 1325 (BIA 2000) 30

Probert v. INS, 750 F. Supp. 252 (E.D. Mich. 1990) 41

Ramos, In re, 23 I. & N. Dec. 336 (BIA 2002) 30

Reno v. Flores, 507 U.S. 292 (1993) 13, 19, 20, 23, 24

Rojas, In re, 23 I. & N. Dec. 117 (BIA 2001) 48

S-H-, In re, 23 I. & N. Dec. 462 (BIA 2002) 26

Santos-Lopez, In re, 23 I. & N. Dec. 419 (BIA 2002) 30

TABLE OF AUTHORITIES – Continued

Page

Schall v. Martin, 467 U.S. 253 (1984) 17

Shaw, In re, 17 I. & N. Dec. 177 (BIA 1979) 32

Solorzano-Patlan v. INS, 207 F.3d 869 (7th Cir. 2000) 30

Stack v. Boyle, 342 U.S. 1 (1951) 27

Sui v. INS, 250 F.3d 105 (2d Cir. 2001) 30

Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984) 40

United States v. Christopher, 239 F.3d 1191 (11th Cir.), *cert. denied*, 122 S.Ct. 178 (2001) 3

United States v. Corona-Sanchez, 291 F.3d 1201 (9th Cir. 2002) 11, 31

United States v. Graham, 169 F.3d 787 (3d Cir. 1999) 3

United States v. Pacheco, 225 F.3d 148 (2d Cir. 2000), *cert. denied*, 533 U.S. 904 (2001) 3

United States v. Salerno, 481 U.S. 739 (1987) ..... *passim*

Valansi v. Ashcroft, 278 F.3d 203 (3d Cir. 2002) 30

Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002) 5, 11, 26

Williams v. INS, No. 01-043, 2001 WL 1136099 (D.R.I. Aug. 7, 2001) 5

Yamataya v. Fisher, 189 U.S. 86 (1903) 25

Zadvydas v. Davis, 533 U.S. 678 (2001) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS:

Anti-Drug Abuse Act of 1988, Section 7343(a), Pub. L. 100-690, 102 Stat. 4181 41

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ..... 7, 42, 49

§ 432, 110 Stat. 1214 7

§ 438(a), 110 Stat. 1273-76 7

§ 440(c), 110 Stat. 1277 ..... 42, 49

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546 2

§ 303(b)(3)(A)(i), 110 Stat. 3009-587 49

§ 303(b)(3)(A)(iii), 110 Stat. 3009-587 49

§ 303(b)(3)(B), 110 Stat. 3009-587 49

§ 326, 110 Stat. 3009-630 7

§ 329, 110 Stat. 3009-631 7

§§ 386-87, 110 Stat. 3009-653 to 655 7

Immigration Act of 1990, Section 504, Pub. L. No. 101-649, 104 Stat. 4978 42

Immigration and Nationality Act ("INA"), 8 U.S.C. 1101 *et seq.* ..... *passim*

8 U.S.C. 506(a)(2) 39

8 U.S.C. 1101 2

8 U.S.C. 1101(a)(43) 28

8 U.S.C. 1101(a)(47) 44

8 U.S.C. 1101(a)(48)(A) 28

TABLE OF AUTHORITIES – Continued

Page

8 U.S.C. 1105a(c) (1994) 47

8 U.S.C. 1158 3

8 U.S.C. 1182(c) (1994) (repealed 1996) 3, 12, 29, 50

8 U.S.C. 1226(a) 45

8 U.S.C. 1226(c) ..... *passim*

8 U.S.C. 1226(c)(1)(A) 2

8 U.S.C. 1226(c)(1)(B) 2

8 U.S.C. 1226(c)(1)(C) 2

8 U.S.C. 1226(c)(1)(D) 2

8 U.S.C. 1226(c)(2) 2

8 U.S.C. 1227(a) 44

8 U.S.C. 1227(a)(2)(A)(i) 2

8 U.S.C. 1227(a)(2)(A)(ii) 2, 28

8 U.S.C. 1227(a)(2)(A)(iii) 2

8 U.S.C. 1228 ..... 46, 48

8 U.S.C. 1228(a)(3)(A) 46

8 U.S.C. 1229(a)(1)(D) 48

8 U.S.C. 1229(b) 12

8 U.S.C. 1229a 48

8 U.S.C. 1229a(b)(5)(A) 32

8 U.S.C. 1229a(b)(7) 32

8 U.S.C. 1229a(c) 4

8 U.S.C. 1229a(c)(1)(A) 44

8 U.S.C. 1229a(c)(5)(A) 44

TABLE OF AUTHORITIES – Continued

Page

8 U.S.C. 1229a(e)(2)(B) 44
8 U.S.C. 1229b 3, 44
8 U.S.C. 1231 ..... 12, 45, 46
8 U.S.C. 1231(a) 39
8 U.S.C. 1231(a)(6) 10, 33
8 U.S.C. 1231(b)(3) 3, 29-30
8 U.S.C. 1252 47
8 U.S.C. 1252(a)(2) (1989) 41
8 U.S.C. 1252(a)(2) (1991) 42
8 U.S.C. 1252(a)(2) (1992) 42
8 U.S.C. 1531-1537 47
8 U.S.C. 1534(i) 47
8 U.S.C. 1536(a)(2) 47
8 U.S.C. 1537(b)(1) 47
18 U.S.C. 3143(b)(1)(B) 32
18 U.S.C. 3152 39
Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Section 306(a)(4), Pub. L. No. 102-232, 105 Stat. 1733 42
8 C.F.R.:
Section 1.1(p) 4, 33, 44, 48
Section 3.1(e) 26
Section 3.6(a) 48
Section 3.14 9
Section 3.19 39

TABLE OF AUTHORITIES – Continued

Page

Section 3.19(a) 5
Section 3.19(f) 5
Section 3.19(h)(2) 6
Section 3.19(i) 5
Section 3.19(i)(2) 8
Section 3.26(b) 32
Section 208.17(a) 4
Section 236.1(d)(1) 5
53 Fed. Reg. 17449 (1988) 19, 20
66 Fed. Reg. 54,909 (Oct. 31, 2001) 8
67 Fed. Reg. 31,157 (proposed May 9, 2002) 8

OTHER AUTHORITIES:

A Review of Department of Justice Immigration Detention Policies: Hearing before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 107th Cong. (2001), *available at* http://www.ins.gov/graphics/aboutins/congress/testimonies/2001/greene_121901.pdf 7, 28

Congressional Task Force on Immigration Reform, *Report to the Speaker* (1995) 7, 37

Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 103d Cong. 21 (1993) 7, 36, 37

GAO, No. GAO/GGD-92-85, *Immigration Control: Immigration Policies Affect INS Detention Efforts* (1992) 6, 7

TABLE OF AUTHORITIES – Continued

Page

H.R. 1915, 104th Cong., Section 303 (1995).....43

H.R. 2202, 104th Cong., Section 303 (1995).....42, 43

H.R. Conf. Rep. No. 104-828 (1996).....43

H.R. Rep. No. 104-469 (1996) 6, 43

Immigration and Naturalization Service, U.S. Dep't of Justice, *Report on Detention and Release of Criminal and Other Aliens* (1997) 28

Immigration and Naturalization Service, *Immigration Act of 1990 Report on Criminal Aliens* (1992)..... 6

Letter from Robert Raben, Ass't Attorney General, to Congressman Barney Frank, 77 Interpreter Releases (West) 217 (2000) 25-26

Leonidas Ralph Mecham, Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts* (1998).....39

Letter from Jon P. Jennings, Acting Ass't Attorney General, to Albert Gore, President of the Senate (June 10, 1999).....25

Office of Planning and Analysis, U.S. Dep't of Justice, *Statistical Yearbook 2001* (2001).....30

Office of the Inspector General, U.S. Dep't of Justice, Rep. No. 02-41, *Audit Report: Immigration and Naturalization Service Institutional Removal Program* (2002) 8

S. 1664, 104th Cong., Section 164(b) (1996).....43

S. 1664, 104th Cong., Section 164(e) (1996).....43

S. Rep. No. 104-48 (1995).....37

TABLE OF AUTHORITIES – Continued

Page

U.S. Comm'n on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility* (1994) 6

Vera Institute of Justice, Testing Community Supervision for the INS (2000), *available at* http://www.vera.org/publication_pdf/aapfinal.pdf.....8, 39

INTRODUCTION

The question in this case is whether the government can subject lawful permanent residents of the United States to an indeterminate and often prolonged period of mandatory detention without any individualized determination that such detention furthers the government's interest in protecting against danger and flight risk. As construed by the government, 8 U.S.C. 1226(c) compels the detention throughout the administrative removal process of any immigrants, including longtime lawful permanent residents, who are charged with being deportable based on a wide range of criminal convictions. The statute applies to immigrants like the respondent, who were convicted of minor nonviolent offenses, who are raising bona fide challenges to removal, and whom the Immigration and Naturalization Service ("INS") itself concedes pose no danger or risk of flight warranting detention.[1]

Respondent does not challenge the government's authority to use detention to ensure the appearance of immigrants at their hearings (and for removal if ultimately ordered) or to protect the public from danger in cases where an alien actually poses a threat or flight risk. Detention under Section 1226(c), however, does not depend on any such finding. The statute prohibits any inquiry into whether detention is actually needed to achieve these ends. Respondent challenges both the application of Section 1226(c) to his case, as an immigrant who is not subject to a final administrative removal order, and its constitutionality as applied to lawful permanent residents.

---

[1] The government's restated "Question Presented" – that "respondent *concedes* that his criminal convictions . . . put him within the class of removable aliens who are subject to detention" (emphasis added) – does not accurately describe the current facts of the case as set forth more fully at pp. 11-12, *infra*.

STATEMENT

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546, amended the INA, 8 U.S.C. 1101 *et seq.*, by, *inter alia*, adding the provision at issue here, 8 U.S.C. 1226(c). The new provision requires the Attorney General to take into custody any alien who "is deportable" based on a criminal conviction specified in the statute, 8 U.S.C. 1226(c)(1)(B)-(C), and prohibits the release of any such alien except in limited circumstances involving witness protection, 8 U.S.C. 1226(c)(2). The convictions that trigger Section 1226(c) include any "aggravated felony," 8 U.S.C. 1226(c)(1)(B), 1227(a)(2)(A)(iii); any two "crimes involving moral turpitude" committed at any time and regardless of the sentence imposed, 8 U.S.C. 1226(c)(1)(B), 1227(a)(2)(A)(ii); and any single "crime involving moral turpitude" if committed within five years of the alien's admission into the United States, where the sentence was a term of imprisonment of at least one year, 8 U.S.C. 1226(c)(1)(C), 1227(a)(2)(A)(i).[2]

Many nonviolent and misdemeanor offenses trigger the detention mandate of Section 1226(c). Under the INA, the term "aggravated felony" may include such crimes as shoplifting, petit larceny, attempted possession of stolen property, and perjury, even if classified as misdemeanors

[2] Two other subsections of Section 1226(c) mandate detention of aliens who are "inadmissible" based on enumerated criminal convictions, 8 U.S.C. 1226(c)(1)(A), or who are charged with "terrorist activities" under the INA, 8 U.S.C. 1226(c)(1)(D). Both of those categories raise distinct constitutional considerations not at issue here. *See Zadvydas v. Davis*, 533 U.S. 678, 695-96 (2001) (noting that Court's constitutional analysis of detention challenge does not necessarily apply to aliens who have not effectuated an entry or to the special considerations that arise in cases involving terrorism).

by the convicting jurisdiction.[3] A "crime involving moral turpitude" may include offenses such as issuance of a bad check, possession of stolen property, making a false statement, and petit theft.[4]

Section 1226(c) applies even though the triggering conviction may later be determined not to constitute an "aggravated felony" or a "crime involving moral turpitude" and thus not a ground of removal at all. Section 1226(c) also imposes detention on many aliens who remain eligible for various forms of relief – both mandatory and discretionary – under the immigration laws and who ultimately prevail in their proceedings. That is especially true for lawful permanent residents like the respondent here.[5] *See*

[3] *See, e.g., United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (misdemeanor shoplifting arising out of theft of four packs of cigarettes and two packs of cold medicine valued at $83.50), *cert. denied*, 533 U.S. 904 (2001); *United States v. Graham*, 169 F.3d 787 (3d Cir.) (state misdemeanor petit larceny with maximum one year prison term), *cert. denied*, 528 U.S. 845 (1999); *United States v. Christopher*, 239 F.3d 1191 (11th Cir.) (state misdemeanor theft by shoplifting), *cert. denied*, 122 S. Ct. 178 (2001); *In re Martin*, 23 I. & N. Dec. 491 (BIA 2002) (third degree misdemeanor assault); *In re Martinez-Recinos*, 23 I. & N. Dec. 175 (BIA 2001) (perjury); *In re Bahta*, 22 I. & N. Dec. 1381 (BIA 2000) (attempted possession of stolen property).

[4] *See, e.g., Michel v. INS*, 206 F.3d 253, 261 (2d Cir. 2000) (possession of stolen property in the fifth degree, involving possession of stolen bus transfers); *In re Alarcon*, 20 I. & N. Dec. 557, 559 (BIA 1992) (petit theft); *In re Bart*, 20 I. & N. Dec. 436 (BIA 1992) (issuance of a bad check).

[5] Lawful permanent residents subject to removal based on a criminal conviction enumerated in Section 1226(c) may be eligible for relief under former 8 U.S.C. 1182(c) (1994) (repealed 1996) (*see INS v. St. Cyr*, 533 U.S. 289 (2001)); for "cancellation of removal" under 8 U.S.C. 1229b or asylum under 8 U.S.C. 1158 if the conviction does not constitute an aggravated felony; for mandatory "withholding of removal" under 8 U.S.C. 1231(b)(3) if the conviction does not constitute a "particularly serious crime;" or mandatory protection against removal under the Convention Against Torture ("CAT") regardless of the nature

(Continued on following page)

Brief Amici Curiae of Citizens and Immigrants for Equal Justice *et al.* ("CIEJ Amici") (enumerating many cases of immigrants detained under Section 1226(c) who subsequently prevailed in their removal proceedings).

Section 1226(c) contains no time limit on the detention it requires and often results in lengthy periods of incarceration. The Attorney General applies the detention mandate of Section 1226(c) throughout administrative removal proceedings, a multi-stage process. The initial stage of a removal hearing, which is conducted before an immigration judge ("IJ"), can take from several months to well over a year. An IJ must determine whether an alien falls within a statutory ground of deportation (as well as any claim that an alien may have acquired United States citizenship through a parent or through naturalization). If the grounds of deportation are established or conceded, the IJ must consider eligibility for relief and adjudicate any claim for which the alien is eligible.

Either the alien or the INS may appeal an IJ's order to the Board of Immigration Appeals ("BIA"), which may affirm or reverse the IJ's rulings or remand for further proceedings. *See* 8 U.S.C. 1229a(c). Appeals to the BIA rarely take less than four months and often take more than a year. The administrative process ends when the BIA issues a final decision (or the time for appeal of an IJ's order expires). In the case of lawful permanent residents, their legal status terminates only when the administrative process is over. *See* 8 C.F.R. 1.1(p); *In re Lok*, 18 I. & N. Dec. 101, 105 (BIA 1981).

Given the time required for hearings and appeals, individuals whose cases are appealed to the BIA can expect to be incarcerated between six months and well

---

of the conviction, 8 C.F.R. 208.17(a). Asylum, withholding, and CAT protection are also available to aliens who are not lawful permanent residents.

over a year.[6] The government offers statistical data purporting to reflect the average period of detention for aliens subjected to Section 1226(c). *See* Pet. Br. at 39-40. This data understates the length of detention for lawful permanent residents and other aliens who challenge their removal. Removal proceedings for lawful permanent residents are likely to be the most protracted because they have the most substantial legal claims and the most at stake.

Section 1226(c) deviates from the individualized release procedures provided to other aliens in removal proceedings. In cases not governed by Section 1226(c), the INS routinely makes individualized bond determinations based on an assessment of danger to the public and flight risk (*i.e.*, whether bond will ensure an alien's appearance in light of an individual's ties to the community and eligibility for relief from removal). Immigration judges regularly review these determinations at brief, informal bond redetermination hearings. *See* 8 C.F.R. 3.19(a), 236.1(d)(1). In cases where an IJ releases on bond an individual whom the INS would not have released, the INS may appeal the bond decision to the BIA (and ultimately the Attorney General) and obtain an automatic stay of the release decision pending that appeal. *See* 8 C.F.R. 3.19(i), (f). For individuals subject to Section 1226(c), however, the statute prohibits any inquiry into flight risk or danger. An individual who is detained

---

[6] *See, e.g., Welch v. Ashcroft*, 293 F.3d 213, 227 (4th Cir. 2002) (lawful permanent resident mandatorily detained 14 months before district court ordered bond hearing); *Abimbola v. Ashcroft*, No. 01-CV-5568, 2002 WL 2003186, *1 (E.D.N.Y. Aug. 28, 2002) (lawful permanent resident mandatorily detained 20 months before BIA order); *Amaye v. Elwood*, No. CV-01-2177, 2002 WL 1747540, *2 (M.D. Pa. June 17, 2002) (conditional resident mandatorily detained more than 16 months, half of this time during INS appeal of favorable ruling); *Williams v. INS*, No. 01-043, 2001 WL 1136099, *1 (D.R.I. Aug. 7, 2001) (BIA appeal pending 20 months while individual mandatorily detained). *See generally* CIEJ Amici (citing additional cases).

pursuant to Section 1226(c) may assert only that he is not properly subject to the statute. 8 C.F.R. 3.19(h)(2); *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999).

2. In the years preceding Congress' enactment of Section 1226(c), little attention was focused on the issue of individualized bond determinations and whether they were accurate in identifying immigrants with criminal convictions who were likely to pose a danger or flight risk. Instead, the studies and hearings that were conducted during this period focused on two principal concerns: (1) the INS's lack of a reliable system for identifying immigrants with criminal convictions while they were still in the criminal justice system, and (2) the INS's lack of sufficient detention space to detain those offenders it was able to identify. Studies showed that, in the case of most immigrants with criminal convictions, the INS did not initiate deportation proceedings while they were still serving their criminal sentences, did not take them into immigration custody when their criminal incarceration ended, and never made a determination as to whether release or detention was appropriate.[7] The studies also showed that, of those taken into custody, many were released because the INS lacked detention space, *not* because the INS determined that they posed no danger or flight risk.[8]

---

[7] *See, e.g.*, GAO, No. GAO/GGD-92-85, *Immigration Control: Immigration Policies Affect INS Detention Efforts* 41 (1992) ("GAO 1992") (noting that due to limited detention space, INS "did not detain all criminal aliens"); Immigration and Naturalization Service, *Immigration Act of 1990 Report on Criminal Aliens* 7 (1992) (noting INS failure to "identify [criminal aliens] and determine deportability during their period of incarceration" as significant factor inhibiting deportation of criminal aliens); U.S. Comm'n on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility* 157-60 (1994) (recommending increased resources to identify criminal aliens and conduct deportation proceedings before completion of their criminal sentences).

[8] *See, e.g.*, H.R. Rep. No. 104-469, pt. 1 at 124 (1996) ("INS is sometimes reluctant to set bonds too high because if the alien is not

(Continued on following page)

Beginning in 1988 and continuing with the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and IIRIRA, Congress enacted measures to facilitate removal of aliens convicted of criminal offenses. Among these measures, Congress directed the INS to identify and track noncitizens with criminal convictions while they were still in the criminal justice system and to establish the Institutional Hearing Program ("IHP") to initiate and complete deportation proceedings during the aliens' criminal incarceration. *See* AEDPA, Pub. L. No. 104-132, Sections 432, 438(a), 110 Stat. 1214, 1273-76 (codified as amended at former 8 U.S.C. 1252); IIRIRA Sections 326, 329 (codified at 8 U.S.C. 1228). Congress also allocated additional funds to expand INS detention capacity. *See* IIRIRA Sections 386-87. As a result, the INS's detention capacity increased from approximately 6,200 beds in 1992 to more than 21,000 beds in 2001.[9] During this same period, the INS also contracted with the Vera Institute of Justice to investigate the efficacy of supervised release as a means of ensuring appearance at

---

able to pay, the alien cannot be released, and a needed bed space is lost. In essence, in deciding to release a deportable alien, the INS is making a decision that the alien cannot be detained given its limited resources."); *Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 103d Cong. 21 (1993) ("1993 Senate Hearing") ("The lack of INS detention space in many of its districts puts pressure on the INS to release, rather than detain, criminal aliens."); Congressional Task Force on Immigration Reform, *Report to the Speaker* 44-45 (1995) ("1995 Task Force Report") (noting that INS "does not have adequate resources for holding facilities" and recommending "that Congress appropriate sufficient funds to expand INS detention facilities to at least 9,000 beds").

[9] *See* GAO 1992, *supra* n.7, at 12 (estimating INS capacity to detain 6,259 individuals in 1992); *A Review of Dep't of Justice Immigration Detention Policies: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 107th Cong. 22 (2001) (Statement of Joseph Greene) (INS had access to 21,304 beds to detain individuals in 2001).

immigration proceedings and more efficient use of INS's limited detention space. The Vera study found that with screening and supervised release, 92-94% of lawful permanent residents with criminal convictions appeared for their hearings.[10]

3. Respondent Hyung Joon Kim is a lawful permanent resident of the United States who has lived in this country since the age of six. Pet. App. 2a, 31a-32a. His mother is a United States citizen and his father and brother are lawful permanent residents. In 1996, Mr. Kim was convicted of first degree burglary of a toolshed, for which he received a sentence of five years' probation and 180 days in jail (of which 117 were suspended). Pet. App. 2a, 32a. In 1997, he was convicted of "petty theft with priors" and sentenced to three years' imprisonment. He was released after serving less than two years. Pet. App. 2a, 32a.[11]

---

[10] *See* Vera Institute of Justice, 1 *Testing Community Supervision for the INS* 36 (2000) ("Vera Study"), *available at* http://www.vera.org/publication_pdf/aapfinal.pdf. More recently, the INS has also implemented other measures to address the problem of immigrants (criminal and noncriminal) who fail to report for removal. *See, e.g.*, 67 Fed. Reg. 31,157 (proposed May 9, 2002) (to be codified at 8 C.F.R. pts. 3, 236, 240, 241) (imposing new penalties on aliens who fail to comply with surrender orders); 66 Fed. Reg. 54,909 (Oct. 31, 2001) (codified at 8 C.F.R. 3.19(i)(2)) (authorizing INS to automatically stay any release decision by an immigration judge releasing an alien whom INS does not want released). A recently released audit by the Office of Inspector General criticized the INS for its continuing failure to identify and deport immigrants with criminal convictions while they are serving their criminal sentences, thereby causing a need for additional detention space when these individuals are released from prison. *See* Office of the Inspector General, U.S. Dep't of Justice, Rep. No. 02-41, *Audit Report: Immigration and Naturalization Service Institutional Removal Program* (2002).

[11] The government erroneously states that Mr. Kim received "a suspended sentence of five years' imprisonment" for his 1996 conviction. *Compare* Pet. Br. at 3, *with* Sentence, No. SC961052 (Cal. Super. Ct. Aug. 1, 1996) (showing that *imposition* of sentence was suspended). That error is significant because a five year term of imprisonment could affect Mr. Kim's eligibility for some forms of relief under the INA.

(Continued on following page)

The INS did not commence removal proceedings against Mr. Kim while he was serving his criminal sentence. Instead, on February 2, 1999, the day after he was released from incarceration, the INS arrested and detained him at a county jail. Pet. App. 2a, 32a. Pursuant to Section 1226(c), the INS refused to consider his release on bond. C.A. E.R. 3.

The INS charged Mr. Kim with being deportable on the ground that his 1997 petty theft conviction constituted an aggravated felony. C.A. E.R. 5. The INS did not formally commence removal proceedings against Mr. Kim until five weeks after his arrest and detention. *See* C.A. E.R. 5 (charging document filed March 10, 1999); 8 C.F.R. 3.14 (proceedings do not commence until charging document filed with immigration court).

In May 1999, after more than three months in INS detention, and while still awaiting his first substantive IJ hearing,[12] Mr. Kim brought a habeas corpus petition challenging the constitutionality of his mandatory detention under Section 1226(c). Pet. App. 2a, 33a. In August 1999, the district court held Section 1226(c) unconstitutional and ordered the government to provide Mr. Kim with an individualized bond determination. Pet. App. 31a-51a. The Attorney General did not seek a stay of the district court's order nor oppose Mr. Kim's release on bond. Instead, five days after the district court decision, and more than six months after Mr. Kim was taken into INS

Subsequent to his 1997 offense, Mr. Kim was sentenced to a two-year prison term for the 1996 conviction, to be served concurrently with the three-year term he received for the 1997 conviction. C.A. E.R. 6.

[12] On April 9, 1999, two months after his arrest and detention by the INS, Mr. Kim received a "master calendar" hearing. At that hearing, the IJ scheduled a further hearing for July 8, three months hence, to consider Mr. Kim's application for withholding of removal. The July hearing was later continued to September 13 to allow Mr. Kim time to obtain documents relevant to his withholding application, which is based on his fear of persecution on account of his religion.

custody, the INS made its own determination that he presented neither a "threat" nor a significant "flight risk" and authorized his release on a $5,000 bond. J.A. at 13.

4. The court of appeals addressed the constitutionality of Section 1226(c) only "as applied to Kim in his status as a lawful permanent resident alien." Pet. App. 30a. The court rejected the government's argument that Congress' plenary authority over immigration dictated a deferential standard of review, finding that as in *Zadvydas v. Davis*, 533 U.S. 678 (2001), detention constitutes a "means" of carrying out Congress' substantive immigration policies. Pet. App. 9a-10a. The court held that the government's interest in using detention as a means for ensuring removal and protecting the public from danger did not permit the complete elimination of any individualized release determination based on flight risk and danger. Pet. App. 13a-21a. The court stressed that Section 1226(c)'s lack of any "provision for an individualized determination of dangerousness" contrasted sharply with the civil detention upheld in *United States v. Salerno*, 481 U.S. 739 (1987), *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Carlson v. Landon*, 342 U.S. 524 (1952), all of which involved individualized detention determinations. Pet. App. 17a-19a.

The Court also noted that the government's rationale for requiring mandatory detention of aliens with criminal convictions during the pendency of removal proceedings was substantially undermined by the fact that the same category of aliens is statutorily *eligible* for release from detention *after* a final order of removal issues. Pet. App. 22a-23a (citing Section 1231(a)(6)). The court of appeals further concluded that Section 1226(c) could not even satisfy the due process standard enunciated in Justice Kennedy's *Zadvydas* dissent because the statute imposes "arbitrary and capricious" detention by eliminating *any* procedure for determining an individual's danger or flight risk. Pet. App. 25a-26a.

The court of appeals ruled on constitutional grounds, rejecting respondent's argument that Section 1226(c) does

not apply to Mr. Kim. Pet. App. 27a-29a. The court recognized that the language of Section 1226(c) is ambiguous, Pet. App. 28a, but declined to adopt respondent's interpretation because it believed that the proposed construction was inconsistent with other language in the statute. Pet. App. 29a.

In addition to the Ninth Circuit, three other courts of appeals have held that, in light of *Zadvydas*, Section 1226(c) violates due process as applied to the lawful permanent resident petitioners in those cases. *See Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002); *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002), *pet. for cert. pending*, No. 01-1616. *But cf. Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999) (decided pre-*Zadvydas* and concerning alien who raised no challenge to removal).

5. On June 6, 2002, after respondent filed his Brief in Opposition with this Court, the Ninth Circuit held that a conviction for "petty theft with priors" under the same California statute under which Mr. Kim was convicted in 1997 does not "qualify as an aggravated felony [under the INA]." *United States v. Corona-Sanchez*, 291 F.3d 1201, 1213 (9th Cir. 2002). On the basis of that ruling, Mr. Kim intends to argue at his next hearing that he is not deportable as an aggravated felon as alleged in his INS charging document.

Ten weeks after the *Corona-Sanchez* ruling (and after the Court's grant of plenary review in this case), the INS amended the immigration charges against Mr. Kim to include his 1996 conviction and to add a new ground of deportation. Pet. Br. at 3 n.2. The additional ground alleges that Mr. Kim's 1996 and 1997 convictions constitute "crimes involving moral turpitude" and that he is now subject to deportation on this basis (which is also a basis for mandatory detention under Section 1226(c)).

At his next scheduled IJ hearing, Mr. Kim will assert that his convictions do not render him deportable because his 1997 conviction does not constitute an aggravated felony under the Ninth Circuit's decision, and his 1996

conviction does not constitute either an aggravated felony or a crime involving moral turpitude. Mr. Kim will further assert that, even if his 1996 conviction were found to be a ground of deportation, he remains eligible for a discretionary waiver of removal under former Section 1182(c) because the offense occurred before IIRIRA's enactment, *see INS v. St. Cyr,* 533 U.S. 289, 294-95, 326 (2001); for mandatory withholding of removal under 8 U.S.C. 1231; and for a discretionary grant of cancellation of removal under 8 U.S.C. 1229(b) (which is available to non-aggravated felons).

SUMMARY OF ARGUMENT

The Court has repeatedly emphasized that freedom from government detention lies at the core of the liberty that the Due Process Clause protects. This principle applies with full force to immigration detention. *Zadvydas v. Davis,* 533 U.S. 678 (2001). Section 1226(c) violates due process as applied to lawful permanent residents because it prohibits any individualized determination that the purposes of detention are being served. As construed by the Attorney General, the statute imposes indeterminate, often prolonged, mandatory detention based solely on an individual's past criminal conviction. Mandatory detention applies even to lawful permanent residents convicted of minor nonviolent offenses, who are contesting their removal and who are not subject to a final administrative order of removal.

1. A. Section 1226(c) is unlike any immigration or non-immigration detention statute that the Court has ever upheld because it imposes categorical detention while prohibiting any individualized determination that detention is actually necessary to serve the government's interests. The Due Process Clause requires, at a minimum, an individualized determination that the purposes of detention are being served. Thus, the hallmark of the Court's civil detention decisions is the presence of individual decisionmaking. *United States v. Salerno,* 481 U.S. 739 (1987); *Foucha v. Louisiana,* 504 U.S. 71 (1992).

The Court's immigration detention decisions, *Carlson v. Landon*, 342 U.S. 524 (1952), *Reno v. Flores*, 507 U.S. 292 (1993), and most recently *Zadvydas*, reflect the same concern for individualized detention determinations. Despite the government's assertions to the contrary, both *Carlson* and *Flores* upheld the *discretionary* detention authority of the Attorney General, not a mandatory detention statute like Section 1226(c). Moreover, as the Court recognized in *Zadvydas*, while Congress possesses plenary power to set substantive immigration policy, detention is a means for implementing that policy and must comport with due process.

B. Section 1226(c)'s prohibition of any individualized detention determination is particularly stark because it results in prolonged detention of a wide array of lawful permanent residents who pose no danger or flight risk, who are raising bona fide challenges to removal, and who often prevail in those challenges. The government's claim that Section 1226(c) is limited in duration and applies only to a subset of criminal aliens whose removal is inevitable is belied by the scope of the statute, the government's own statistics showing an "average" of six months detention for individuals whose cases are appealed to the BIA, and numerous examples of individuals who were mandatorily detained for long periods of time and subsequently prevailed in their challenges to removal. The fact that the Attorney General allows immigrants to assert that they are *not* encompassed by Section 1226(c) – an inquiry that does not consider flight risk or danger or even an individual's eligibility for relief from removal – does nothing to diminish the statute's constitutional infirmity for those who are covered by the statute.

C. The mandatory detention imposed by Section 1226(c) is wholly unjustified by the government's interests in removing criminal aliens and protecting the public during that process. The voluminous legislative history and studies relied upon by the government are not to the contrary. The government's own statistics show that 80% of criminal aliens appear for their removal proceedings.

The government's other figures are of little relevance because they are based on studies that were conducted during a period of time when INS release decisions were driven more by space constraints than by individualized determinations of danger and flight risk, and thus do not demonstrate that such determinations are ineffective. Nor would individualized release determinations impose any significant burden or delay, as the Attorney General routinely makes such determinations in removal cases not subject to the restrictions of Section 1226(c). Moreover, individuals detained under Section 1226(c) are already entitled to a hearing at which they can challenge the INS's determination that they are properly subject to the statute. Consideration of danger and flight risk could easily be incorporated into this existing procedure.

2. The Court need not reach the profound constitutional issues raised in this case because, properly construed, Section 1226(c) does not apply to respondent. Section 1226(c) requires mandatory detention only when an alien "is deportable" based on one of the enumerated grounds in the statute – language that is distinct from prior mandatory detention statutes where Congress required detention of any alien "convicted" of the designated offenses. An alien is not "deportable" until a final administrative order of removal issues at the conclusion of removal proceedings. Because no such order has issued in respondent's case, he is not subject to mandatory detention under the statute.

ARGUMENT

I. SECTION 1226(c) VIOLATES THE DUE PROCESS CLAUSE AS APPLIED TO LAWFUL PERMANENT RESIDENTS LIKE RESPONDENT

Less than two years ago, in a case involving immigration detention, the Court reaffirmed that "[f]reedom from

imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause [of the Fifth Amendment] protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citations omitted). *See also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.") (citations omitted); *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception."). "[I]ncarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference[ ] . . . freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution." *Foucha*, 504 U.S. at 90 (Kennedy, J., dissenting).

Because of the significant liberty interest involved, the Court has upheld civil detention only "in certain special and 'narrow' non-punitive 'circumstances,'" where the government's interest "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (quoting *Foucha*, 504 U.S. at 80, and *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). Although the Court has articulated varying formulations for this test, *see, e.g., Salerno*, 481 U.S. at 747 (detention cannot be "excessive in relation to the regulatory goal Congress sought to achieve"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (the nature and duration of detention must bear a "reasonable relation" to the purposes for which the individual is detained), at a minimum, due process requires an individualized determination that the purposes of detention are actually being served. Section 1226(c) fails this minimum requirement.

A. Section 1226(c) Violates Due Process Because It Prohibits Any Individualized Determination Of Danger Or Flight Risk

Section 1226(c) violates the Due Process Clause because it requires mandatory, across-the-board detention based solely on an individual's past criminal conviction and prohibits any assessment of an individual's actual dangerousness or flight risk. The Court has never upheld – nor has the government previously sought to defend – a statute that imposes a blanket requirement of detention, while prohibiting *any* individualized determination that such detention is necessary. As illustrated most recently by *Zadvydas*, the Court has consistently applied the same due process principles to all civil detention statutes. *See* 533 U.S. at 690-92 (applying due process standards from civil commitment and pre-trial detention cases to immigration detention statute).

1. The bare minimum that due process requires of any detention scheme is an individualized showing that detention of a particular person is warranted in light of the government's purpose for the detention. That minimum requirement is reflected in all of the Court's civil detention decisions.

The pre-trial detention context is especially relevant to this case because it concerns the authority to detain individuals during the pendency of a proceeding to determine whether an allegation or charge will be sustained. Where pre-trial detention is at issue, the Court has recognized the importance of an individualized hearing to determine if detention is necessary to ensure appearance at trial or to protect the public from danger. In *Salerno*, for example, the Court emphasized that the statute required the government to demonstrate in a "full-blown adversary hearing" before a judicial officer by "clear and convincing evidence" that "no conditions of [pre-trial] release [could] reasonably assure the safety of the community or any person." 481 U.S. at 750. The judge, moreover, was required to consider the individual's specific circumstances, such as "the nature and seriousness of the charges, the

substantiality of the Government's evidence . . . , the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release." *Id.* at 742-43. Only in light of such a prompt and individualized determination of danger did the Court conclude that pre-trial detention was not "excessive in relation to the regulatory goal Congress sought to achieve." *Id.* at 747.[13]

In *Schall v. Martin*, the Court applied the same "excessive" standard to pre-trial detention of juveniles. 467 U.S. 253, 269 (1984). It specifically noted that an individual judicial hearing was required at which a judge could consider "the nature and seriousness of the charges; . . . the juvenile's prior record; the adequacy and effectiveness of his home supervision; . . . and any special circumstances" raised by "the probation officer, the child's attorney, or any parents, relatives, or other responsible persons accompanying the child." 467 U.S. at 279. *Schall* stressed the critical importance of these elements even though the Court found that the liberty interest of juveniles was more qualified than that of adults, *id.* at 265, and even though the maximum permissible length of detention was only seventeen days, *id.* at 270.

The Court's civil commitment cases exhibit the same imperative for an individualized determination of whether the purposes of commitment are served in a particular case. For example, *Jackson* invalidated a statute allowing indefinite commitment of defendants who were incompetent to stand trial, because the statute did not require an assessment of whether the commitment would serve the purpose of the detention, *i.e.*, aiding a defendant to become competent. 406 U.S. at 737-38. The Court emphasized that, "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable

---

[13] *See also* Brief for the United States at 14, 38-39, *Salerno* (No. 86-87) (stressing, *inter alia*, the existence of "an individualized judgment of dangerousness," as supporting constitutionality of statute).

relation to the purpose for which the individual is committed." *Id.* at 738.

Even where an individualized determination is provided, due process requires that the determination be one that sufficiently protects against the erroneous or arbitrary detention of individuals for whom detention would not serve the government's purpose. Thus, *Addington v. Texas* struck down a statute allowing for civil commitment of mentally ill individuals based on "a mere preponderance of the evidence" standard. 441 U.S. 418, 427 (1979). Although the statute provided for individualized determinations, the standard was insufficiently protective in light of the "weight and gravity" of the individual's liberty interest. *Id.* at 427. The Court explained that "the State ha[d] no interest in confining individuals involuntarily if they [were] not mentally ill or if they [did] not pose some danger," and that the unduly lenient preponderance standard "create[d] the risk of increasing the number of individuals erroneously committed." *Id.* at 426-27.

Similarly, *Foucha* invalidated a statute as a violation of due process because it allowed for the detention of insanity acquittees who were no longer mentally ill and "place[d] the burden on the detainee to prove that he [was] not dangerous." 504 U.S. at 82. Notably, no Member of the Court suggested that a detainee could be deprived of *any* opportunity even to rebut a presumption of dangerousness. The issue that divided the Court was whether the Due Process Clause permitted placing the burden *on the detainee* to prove lack of dangerousness. *See, e.g., id.* at 114 n.10 (Thomas, J., dissenting) ("This would be a different case if Foucha had established that the statutory mechanisms for release were nothing more than window dressing, and that the State in fact confined insanity acquittees indefinitely without meaningful opportunity for review and release.").

The Court's immigration detention decisions further demonstrate that individualized determinations are essential for a detention statute to survive due process

scrutiny. For example, in *Carlson v. Landon*, the Court upheld the Attorney General's authority to detain alien Communists based on his discretionary decision, pursuant to an individualized determination, that release of a particular alien would pose a danger to the public. 342 U.S. 524, 538, 541-42 (1952). Although deportation could be premised on Communist Party membership alone, the Court drew a sharp distinction between the ground of deportation and the basis for detention, which required an additional determination of dangerousness based on "personal activity" or "active[ ] participat[ion]" in indoctrination. *Id.* at 541 (explaining that detention determination was grounded on "evidence of membership *plus* personal activity in supporting and extending the Party's philosophy concerning violence") (emphasis added); *id.* at 530 (detention based on evidence that individuals were "actively participating in the Party's indoctrination of others to the prejudice of the public interest"). The Court stressed that only a small subset of deportable communist aliens were actually held without bail and noted the "allowance of bail in the large majority of cases." *Id.* at 542; *see id.* at 538 (stating that "[o]f course purpose to injure could not be imputed generally to all aliens subject to deportation").

Similarly, in *Reno v. Flores*, the availability of an individualized custody determination was key to the Court's finding that the provision was constitutional. 507 U.S. 292 (1993). The regulation there presumed that juvenile aliens could be released from INS custody only to adult relatives or legal guardians. *Id.* at 297. However, it specifically "maintain[ed] the discretion of local INS directors to release detained minors to other custodians in 'unusual and compelling circumstances.'" *Id.* at 310 (quoting 53 Fed. Reg. 17449 (1988)); *see also id.* at 313-14 (noting that among the determinations INS made in each individual case was whether "the alien's case [was] so

exceptional as to require consideration of release to someone else").[14] Significantly, the liberty interest in *Flores* was more qualified because juveniles do not have the same degree of autonomy as adults and thus "'freedom from physical restraint' . . . [was] not at issue . . . in the sense of a right to come and go at will." *Id.* at 302. In addition, the Court stressed that the juveniles were held in licensed juvenile care facilities, rather than in "shackles, chains, or barred cells." *Id.*

In *Zadvydas*, as well, the provision in question provided for individualized determinations of flight risk and danger. In questioning the statute's constitutional validity, the Court reiterated that it had "upheld preventive detention based on dangerousness only when . . . subject to strong procedural protections," including "proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards." 533 U.S. at 691 (citing *Kansas v. Hendricks*, 521 U.S. at 346, 347 (1997) and *Salerno*, 481 U.S. at 747, 750-52). The dissent also underscored the critical importance of individualized determinations of danger and flight risk. "Whether a due process right is denied when removable aliens who are flight risks or dangers to the community are detained turns . . . on

[14] *See also* 53 Fed. Reg. 17449 (1988) (explaining that "[t]he intent of the regulation is to provide Service officials with the broadest possible discretion so that each case may be viewed based on a totality of the juvenile's circumstances"); *Flores v. Meese*, 942 F.2d 1352, 1377 (9th Cir. 1991) (en banc) (Wallace, J., dissenting) ("Even children whose release is not mandated under the regulation can, in the discretion of the INS, be released to other responsible adults."), *rev'd sub nom. Reno v. Flores*, 507 U.S. 292 (1993). Notably, the INS's discretionary determination was further reviewable by an immigration judge, the BIA and the federal courts. *Flores*, 507 U.S. at 308. The court of appeals had found the INS procedures inadequate "because they [did] not provide for *automatic* review by an immigration judge" of the INS's custody decision. *Id.* (emphasis in original). The Court rejected that view because it held that "due process is satisfied by giving the detained alien juveniles the *right* to a hearing before an immigration judge." *Id.* at 309 (emphasis in original).

whether there are adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large." *Id.* at 721 (Kennedy, J., dissenting).

As illustrated by these cases, Section 1226(c) goes far beyond any detention statute that the Court has ever considered or upheld. The statute provides for no individualized determination whatsoever as to whether the purposes of detention are served – much less a full-blown adversary hearing before a judicial officer; it allows for no consideration of an individual's background and characteristics or the nature and seriousness of an offense; and it prohibits release altogether, even for individuals whom the government itself concedes pose no danger or flight risk. Under the government's construction, detention is *required* merely because an immigrant has been convicted of one of the crimes designated under the statute. Section 1226(c)'s irrebuttable and inescapable mandate is unprecedented and constitutionally indefensible.[15]

2. The government nonetheless asks the Court to allow a categorical detention rule that has never been permitted in other settings because this case arises in the immigration context. Pet. Br. at 32-33; *id.* at 32 n.13 (arguing for "rational basis" review). However, as *Zadvydas* confirms and as already noted, the due process standard applicable to all other civil detention schemes applies equally to immigration detention. *See* 533 U.S. at 690. The Court has applied immigration and non-immigration

[15] The government cites *Kansas v. Hendricks* and *Jones v. United States* to suggest that a conviction, by itself, can be a proxy for danger. *See, e.g.*, Pet. Br. at 35 (citing *Hendricks*, 521 U.S. at 358); *id.* at 42 (citing *Jones*, 526 U.S. 227, 249 (1999)). However, in both cases the statutes allowed the individual to rebut any presumptions of dangerousness triggered by a prior conviction. That is precisely what Section 1226(c) lacks.

detention decisions interchangeably in assessing the constitutionality of detention schemes in both contexts. *See, e.g., Salerno*, 481 U.S. at 748 (citing *Carlson*, 342 U.S. at 537-42, to support pre-trial detention based on danger); *Zadvydas*, 533 U.S. at 690 (citing *Salerno*, 481 U.S. at 739; *Foucha*, 504 U.S. at 80; and *Hendricks*, 521 U.S. at 356).

The government's argument that Congress' plenary authority over immigration justifies a more deferential standard of review ignores the distinction between Congress' authority to set substantive immigration policies and the means for implementing those policies. Congress' plenary authority over immigration is relevant to Congress' ability to designate the offenses and convictions that may render an alien subject to deportation. However, as recognized most recently in *Zadvydas*, the *means* that Congress chooses to implement those policies are not subject to the same deference. *See Zadvydas*, 533 U.S. at 695 ("Congress must choose 'a constitutionally permissible means of implementing' its immigration power.") (quoting *INS v. Chadha*, 462 U.S. 919, 941-42 (1983)); *see also Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982) (the judiciary must determine "whether the procedures meet the essential standard of fairness under the Due Process Clause"); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (while "[p]olicies pertaining to the entry of aliens and their right to remain here" are entitled to deference, "[i]n the enforcement of these policies ... the Government must respect the procedural safeguards of due process") (citations omitted).[16]

[16] Thus, the government's reliance on cases like *Fiallo v. Bell* and *Harisiades v. Shaughnessy* (see Pet. Br. at 23, 33) is plainly misplaced because those cases involve Congress' substantive policy judgments concerning which classes of aliens are admissible or deportable. *See Fiallo v. Bell*, 430 U.S. 787, 789-91 (1977) (legislation restricting admission of illegitimate alien children); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-90 (1952) (making Communist party membership grounds for deportation).

At issue here is *not* Congress' substantive immigration policy that immigrants convicted of certain crimes be deported, but whether Congress can enforce that policy by mandatorily detaining lawful permanent residents throughout their deportation proceedings. As *Zadvydas* makes clear, detention is a "means" by which substantive deportation policy is to be implemented. The government acknowledges that Section 1226(c) is one of the "particular removal *procedures*" that Congress adopted to effectuate its policy of removing immigrants with criminal convictions. Pet. Br. at 25 (emphasis added); *see also id.* at 8-9 (stating that Congress enacted mandatory detention to "implement its immigration policies"). Thus, consistent with *Zadvydas*, Section 1226(c)'s blanket requirement of detention during the pendency of deportation proceedings is not subject to the deference afforded substantive immigration policies. Rather it must comport with the due process standards that apply to any civil detention statute. *See* 533 U.S. at 690; *see generally* Brief Amici Curiae of Law Professors ("Law Professors Amici").

As noted above, the government's characterization of *Carlson* and *Flores* as supporting blanket detention during removal proceedings is flatly wrong. *See* Pet. Br. at 33. The government's brief in *Carlson* emphasized that a "mandatory" or "blanket" detention policy was *not* at issue. *See* Brief for the United States at 17, 19, *Carlson* (No. 35) (arguing that Attorney General did not use a "blanket approach" and did not interpret the detention statute as making it "mandatory" to deny bail to all alien Communists).[17] The question in *Carlson* was the same that the

[17] The government relies solely on the dissenting opinion in *Carlson* to support its characterization of the decision as upholding categorical detention of alien Communists. *See* Pet. Br. at 33 (citing *Carlson*, 342 U.S. at 559, 568 (Frankfurter, J., dissenting)). But the Court rejected the dissent's premise, finding instead that discretion was actually being exercised and that bail was allowed "in the large majority of cases." *Carlson*, 342 U.S. at 542. The Court had specifically asked the Department of Justice to provide a report on this issue,

(Continued on following page)

Court later confronted in *Salerno*, namely, whether danger could even be *considered* by the Attorney General in exercising his discretion to detain an alien during deportation proceedings. *See* 342 U.S. at 533-34. The Court held that danger could be considered, *not* that it could be presumed irrefutably. *See id.* at 538.

Flores also did not involve "a 'blanket' presumption" (Pet. Br. at 33) of detention. *See* n.14 and accompanying text, *supra*. It was the respondents in *Flores* who described the policy as a "'blanket' presumption," not the Court, which characterized the policy as one based on "reasonable presumptions and generic rules," neither of which were incompatible with "some level of *individualized determination*." 507 U.S. 292, 313 (1993) (citations omitted) (emphasis added).

Finally, the government's argument that the constitutional concerns identified in *Zadvydas* apply only to the specific circumstances of that case (*see* Pet. Br. at 32 n.13, 38-42) ignores the importance the Court placed on procedures for ensuring that the purposes of detention are served. In *Zadvydas*, the Court questioned the adequacy of the procedures that were available for deciding release of aliens with final orders of deportation. In contrast, Section 1226(c) provides *no* procedure at all whereby an individual can obtain release based on a lack of danger and flight risk.

As applied by the Attorney General, the statute at issue here is even more sweeping than the statute in *Zadvydas* because it affects lawful permanent residents like the respondent who retain their right to live and work in this country. In contrast, the aliens in *Zadvydas* had already been ordered deported and had lost their permanent resident status. *See Zadvydas*, 533 U.S. at 720 (Kennedy, J., dissenting) ("[I]t must be made clear these

---

further indicating its desire to ensure that the Justice Department was not implementing its policy in a categorical manner. *Id.*

aliens are in a position far different from aliens with a lawful right to remain here."). In light of the special constitutional protection afforded lawful permanent residents, *see Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982), as well as the long-standing recognition that deportation proceedings must comply with procedural due process, *see Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903), the government's plenary power argument carries even less weight in this case than it did in *Zadvydas*. *See generally* Law Professors Amici.

B. Section 1226(c) Results In Prolonged Detention Of Lawful Permanent Residents Who Pose No Danger Or Flight Risk And Who Are Raising Bona Fide Challenges To Removal

Section 1226(c)'s prohibition of any individualized release determination is particularly harsh because it results in the prolonged detention of many lawful permanent residents like respondent who are convicted of relatively minor crimes, are raising bona fide challenges to removal, and may ultimately prevail in their proceedings.

The government seeks to defend Section 1226(c) by asserting that the detention it authorizes is "limited in duration" and applies only to a subset of immigrants who have been convicted of particularly serious crimes and whose removal is inevitable. Pet. Br. at 10-11, 21-22. These claims are belied by the statute itself, the Justice Department's own acknowledgment that the statute went "too far" in requiring detention of individuals convicted of relatively minor crimes,[18] and by the numerous examples

---

[18] *See, e.g.*, Letter from Jon P. Jennings, Acting Ass't Attorney General, to Albert Gore, President of the Senate at 1 (June 10, 1999) (C.A. Appellee Br. Ex. E) (noting that "in some respects, [IIRIRA] went too far and hindered other enforcement efforts"); *see also* Letter from Robert Raben, Ass't Attorney General, to Congressman Barney Frank,

(Continued on following page)

of individuals who have suffered prolonged detention only to prevail in their challenges to removal. *See* CIEJ Amici (citing examples).

1. Detention under Section 1226(c) is indeterminate in length and, especially for many lawful permanent residents, prolonged. *See* n.6, *supra* (citing cases). The statute fixes no time limit on the detention it commands. The government seeks to avoid that fact by arguing that detention under 1226(c) has an "obvious termination point" – the conclusion of removal proceedings – and is therefore "limited in duration." Pet. Br. at 10, 39. But, as the Fourth Circuit emphasized, the existence of a "termination point" does not prevent detention from being either indefinite or prolonged, as there is "no clearly identifiable deadline by which that event must take place." *Welch v. Ashcroft*, 293 F.3d 213, 227 (4th Cir. 2002).

The government's statistics themselves show that, for individuals whose cases are appealed to the BIA, Section 1226(c) requires an "average" period of detention of six months. *See* Pet. Br. at 39-40 (reporting 47 day average for IJ hearings and four months for BIA appeals).[19] Moreover, the

77 Interpreter Releases (West) 217, 219 (2000) (acknowledging that Section 1226(c) applies to "individuals who committed relatively minor crimes and pose neither a danger to the community nor a flight risk").

[19] The government suggests that new procedures may shorten the time for BIA appeals. *See* Pet. Br. at 40 n.18. Any change, however, is speculative and likely transitory. For example, to the extent that these regulations result in more cases being remanded to the IJs, they are likely to *prolong* the administrative process. *See In re S-H-*, 23 I. & N. Dec. 462, 464-65 (BIA 2002) (explaining that scope of review under new regulations "restrict[s] [BIA] in its authority to engage in fact-finding on appeal, which might be necessary to bring a case to resolution"). In any event, even under the new regulations, the deadline for adjudication of "streamlined" appeals is still between 90 and 164 days, 8 C.F.R. 3.1(e), not including 21 days for submission of briefing (which can be extended), 30 days for filing the notice of appeal, and frequent delays of months for preparation of transcripts of the IJ proceedings (which are necessary before briefing can even commence).

government's focus on the "average" duration of proceedings, and, in particular, the "average" length of proceedings before an IJ, obscures the actual impact of the statute. *See* Pet. Br. at 10 (arguing that removal proceedings "generally are resolved by immigration judges within approximately one month"). These averages understate the length of detention for everyone who falls above the average. More significantly, they completely disregard the substantial additional time that the government's own statistics show is required for administrative appeals.[20]

The government's averages are also skewed downward by the substantial percentage of Section 1226(c) detainees who do not challenge their removal. According to these statistics, fully half of the individuals detained under Section 1226(c) fall into this category. *See* Pet. Br. at 39 (noting that "median" length of detention was 30 days). For these individuals, immigration proceedings are likely to conclude in a matter of days or at most weeks. Thus, the government's averages significantly understate the length of proceedings for lawful permanent residents who challenge their removal. *See* pp. 9-10, *supra*; *see also* Brief Amici Curiae of T. Alexander Aleinikoff *et al.* ("Former INS Officers Amici") (arguing that government's averages are "irrelevant" for this population).

As the Court has recognized, moreover, *pre-hearing* detention triggers special concerns because it impedes individuals' ability to present their cases. *See Stack v. Boyle*, 342 U.S. 1, 4 (1951). Such obstacles are particularly formidable for aliens in removal proceedings because they

[20] Further, the government's statistics measure length of detention beginning from the formal commencement of proceedings. As respondent's case demonstrates, however, the formal commencement of proceedings may occur substantially *after* the INS takes an alien into custody. *See*, p. 9, *supra* (noting that INS did not commence proceedings against respondent until five weeks after his arrest and detention by INS). A calculation of detention time based on when proceedings commence therefore understates the actual time that aliens are detained.

are not entitled to appointed counsel, and are often jailed in isolated areas. *See* CIEJ Amici and Former INS Officers Amici (describing these and other obstacles affecting individuals subject to mandatory detention).

2. The government's claim that Section 1226(c) is limited to a subset of criminal aliens whose crimes "Congress deemed especially serious," Pet. Br. at 22, is also wrong. *See also id.* at 10, 34-35. Indeed, it is contradicted by the INS's own statements that Section 1226(c) applies to "virtually all aliens who are chargeable as criminals."[21] As previously noted, the statute is not limited to crimes that are particularly dangerous. Rather, it encompasses theft offenses, petty crimes, shoplifting and a wide array of minor and nonviolent crimes, including misdemeanors. *See* nn.3 & 4, *supra*.[22] Even convictions that do not result in any imprisonment on the criminal charge trigger mandatory detention.[23] *See, e.g.*, CIEJ Amici (setting forth

[21] *A Review of Dep't of Justice Immigration Detention Policies: Hearing before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 107th Cong. (2001) (statement of Joseph Greene, Acting Deputy Exec. Assoc. Comm'r for Field Operations, and Edward McElroy, Dist. Dir., N.Y., U.S. Immigration and Naturalization Service), *available at* http://www.ins.gov/graphics/aboutins/congress/testimonies/2001/greene_121901.pdf. *See also* Immigration and Naturalization Service, U.S. Dep't of Justice, *Report on Detention and Release of Criminal and Other Aliens* 10 (1997) (estimating that 95% of criminal aliens in federal and state prisons and on parole would be subject to mandatory detention under 1226(c)).

[22] *See generally* 8 U.S.C. 1101(a)(43) (defining "aggravated felony" to include more than twenty broad categories of crimes, among these, receipt of stolen property, tax evasion, and offenses related to document fraud); *INS v. St. Cyr*, 533 U.S. 289, 296 nn.4 & 6 (noting that aggravated felony "has always been defined expansively, [and] was broadened substantially by IIRIRA" to include more "minor" crimes).

[23] *See* 8 U.S.C. 1101(a)(48)(A) (where ground of deportability requires prison sentence, this requirement deemed satisfied even when execution or imposition of sentence is entirely suspended); 8 U.S.C. 1227(a)(2)(A)(ii) (deportation based on two crimes involving moral turpitude "regardless of whether confined").

additional examples of individuals subjected to mandatory detention, notwithstanding the relatively minor nature of their offenses). Section 1226(c) thus stands in stark contrast to the statutes upheld in *Salerno* and *Hendricks*, which not only provided for individualized determinations of danger but were limited to classes of crimes far more indicative of danger than those that trigger Section 1226(c).[24]

Moreover, Section 1226(c) mandates the detention of aliens who are ultimately not removable, either because they remain eligible for relief from removal or because they are able to successfully challenge the INS's alleged grounds for deportation. For example, lawful permanent residents who are charged as deportable for having been convicted of "crimes involving moral turpitude" remain eligible for discretionary "cancellation of removal" and other forms of relief. *See* n.5, *supra*. If their criminal offenses pre-date IIRIRA, like respondent's, they may be eligible for Section 1182(c) waivers of deportation under *St. Cyr*.[25] Even if they are ineligible for such waivers, they may still qualify for withholding of removal under 8 U.S.C.

[24] *See Hendricks*, 521 U.S. at 368 (commitment limited to "small segment of particularly dangerous individuals" who had served time for or been charged with serious sex offenses); *Salerno*, 481 U.S. at 747 (pre-trial detention limited to "most serious of crimes," *i.e.*, "offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders") (citing 18 U.S.C. 3142(f) (1982 & Supp. III)).

[25] The government argues that *St. Cyr* relief will rarely be available because immigrants now detained under Section 1226(c) will necessarily have served a disqualifying five years in prison. *See* Pet. Br. at 28. That ignores the fact that the INS regularly initiates removal proceedings many years after the completion of a criminal sentence and applies Section 1226(c) to aliens released from criminal custody any time after October 1998. As for respondent, because he would have been eligible for Section 1182(c) relief when he waived his right to a jury trial in 1996, he has a strong argument under *St. Cyr* that elimination of the Section 1182(c) waiver imposes new legal consequence on his decision to forego a jury trial. *See* 533 U.S. 325-26.

1231(b)(3),[26] or deferral of removal under the Convention Against Torture.

In addition, many individuals have successfully asserted that their offenses do not constitute "aggravated felonies" or "crimes involving moral turpitude," thereby eliminating altogether the grounds for deportation.[27] For example, respondent's 1997 conviction for petty theft, though charged as an aggravated felony, does not

[26] The government argues that withholding of removal is rarely granted. *See* Pet. Br. at 30 (calculating only 7% grant rate for withholding applications during 2001 based on comparing number of grants against number of applications). But the government's figure is based on the erroneous assumption that every withholding application not granted was necessarily denied, whereas in fact, withholding applications are rarely adjudicated unless the accompanying asylum application is denied. *See In re Mogharrabi*, 19 I. & N. Dec. 439, 447 (BIA 1987). The grant rate for withholding applications is more accurately reflected by comparing the number of grants, 3,450, against the number of asylum denials, 14,956. *See* Office of Planning and Analysis, U.S. Dep't of Justice, *Statistical Yearbook 2001*, at O2 (2001). Based on this comparison, it appears that the grant rate for withholding applications during 2001 was closer to 20%.

[27] Whether a crime is properly classified as an "aggravated felony" has proven to be a highly contested issue. For example, the BIA recently overruled its own precedent that had found driving under the influence to constitute a "crime of violence" and hence an "aggravated felony," in light of the overwhelming circuit precedent to the contrary. *See In re Ramos*, 23 I. & N. Dec. 336 (BIA 2002) (discussing circuit split). For other cases rejecting the INS's treatment of offenses as aggravated felonies, *see, e.g.*, *Sui v. INS*, 250 F.3d 105 (2d Cir. 2001) (possession of counterfeit securities); *Valansi v. Ashcroft*, 278 F.3d 203 (3d Cir. 2002) (embezzlement); *Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001) (vehicular homocide); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001) (drunk driving); *Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000) (vehicle burglary); *Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001) (money laundering in amount of $1,310); *In re Santos-Lopez*, 23 I. & N. Dec. 419 (BIA 2002) (possession of 0-2 ounces of marijuana); *In re Perez*, 22 I. & N. Dec. 1325 (BIA 2000) (vehicle burglary); *In re Alvarado-Alvino*, 22 I. & N. Dec. 718 (BIA 1999) (aiding and abetting an alien's entry at improper time and place); *In re Espinoza*, 22 I. & N. Dec. 889 (BIA 1999) (misprision of a felony).

constitute such an offense under *United States v. Corona-Sanchez*, 291 F.3d 1201, 1213 (9th Cir. 2002).

The government suggests that the harshness of detention under Section 1226(c) is ameliorated by the availability of a hearing where individuals can assert that they are not "subject to" the statute. *See* Pet. Br. at 26 (citing regulations and *In re Joseph*, 22 I. & N. Dec. 799, 805 (BIA 1999)). However, the fact that the Attorney General allows individuals to demonstrate they are *not* covered by the statute does nothing to diminish the constitutional infirmity for those who *are* covered. Indeed, the *Joseph* hearing does not address the constitutionally significant question of whether an individual presents a danger or flight risk. Nor does the hearing consider whether an alien is eligible for discretionary relief and thereby may ultimately prevail in his proceedings.[28] Moreover, even as to the one question that the *Joseph* hearing does address – whether an alien is subject to the statute – the burden that an alien must satisfy is so great that even aliens with bona fide challenges to the INS's charge of removability are unlikely to avoid mandatory detention while they pursue their claims.[29]

[28] The government argues that because some relief from removal is discretionary, any immigrant who is requesting such relief has "no claim to be free from mandatory detention on that basis." Pet. Br. at 27. But the government does not and cannot assert that an immigrant could be deported without a lawful adjudication of his claim for discretionary relief. *See INS v. St. Cyr*, 533 U.S. 289 (2001). Thus, adjudications of discretionary waivers of removal are an integral part of the removal decision. *See Foti v. INS*, 375 U.S. 217, 223-24 (1963). The government's argument also overlooks that some forms of relief, such as withholding and CAT, are mandatory.

[29] Under *In re Joseph*, an alien can escape mandatory detention only if he can demonstrate that the INS is "substantially unlikely" to establish the ground for deportation that is charged. *See* 22 I. & N. Dec. 799. However, the kinds of legal claims that determine whether an alien is "subject to" Section 1226(c) frequently require reversal of the BIA by a federal court, or reversal by the BIA of its own precedent. *See* n.27, *supra*. Notably, *Joseph* imposes a substantially higher standard

(Continued on following page)

Section 1226(c) exacts its harshest toll on lawful permanent residents. By all recognized criteria, lawful permanent residents are the best candidates for release on bond due to their "family ties," "community ties," and "length of residence in the United States." *See In re Shaw*, 17 I. & N. Dec. 177, 178-79 (BIA 1979) (citing each of these factors as supporting release on bond for individuals in deportation proceedings). Because they have the strongest claims to relief from removal, they have an obvious incentive to appear for removal hearings. (This is especially the case because failure to appear will result in an "in absentia" removal order and a complete forfeiture of the right to reside in this country[30]). However, the fact that lawful permanent residents are more likely to have substantial claims for relief also results in their immigration proceedings being more protracted. Thus, Section 1226(c) often compels lawful permanent residents to choose between prolonged mandatory detention and abandoning bona fide claims to legal status.

The government ignores this issue entirely, wrongly asserting that the convictions that trigger Section 1226(c) "are sufficient to terminate . . . permanent resident status" and thus sufficient to require detention. Pet. Br. at 36. But, as already explained, many immigrants subject to Section 1226(c), including respondent, have claims that will *preserve* their permanent resident status. Moreover, the government's argument conflates Congress' power to establish substantive categories for deportation with

---

than is imposed on many convicted criminal defendants seeking release pending appeal under the Bail Reform Act. *See* 18 U.S.C. 3143(b)(1)(B) (permitting release upon showing that appeal "is not for the purpose of delay and raises a substantial question of law or fact likely to result in" reversal or certain other favorable dispositions).

[30] *See* 8 C.F.R. 3.26(b) (requiring in absentia order of removal for failure to appear); 8 U.S.C. 1229a(b)(5)(A), (7) (describing other penalties that result from failure to appear, including 10-year bar on seeking discretionary relief).

Congress' authority to impose detention. *See* Point I.A.2., *supra*. As *Carlson* made clear, the mere fact that an alien is subject to a ground of deportation does not by itself constitute sufficient grounds to impose detention. The *Carlson* Court emphasized that the "purpose to injure could not be imputed generally to all aliens subject to deportation, so *discretion* was placed . . . in the Attorney General to detain aliens without bail." 342 U.S. at 538 (emphasis added).

Moreover, lawful permanent residents retain their legal status until they receive a final administrative order of removal – which comes only *after* the BIA renders its decision. 8 C.F.R. 1.1(p); *see also In re Lok*, 18 I. & N. Dec. 101, 105 (BIA 1981). The Attorney General imposes mandatory detention *before* an order of removal issues. Ironically, *after* a final order issues, and an individual has *lost* his permanent resident status, the INA permits discretionary release of aliens who can demonstrate lack of danger and flight risk. *See* 8 U.S.C. 1231(a)(6) (authorizing discretionary release of criminal aliens 90 days after final order of removal).

C. The Government Has Not Shown That Individualized Bond Hearings Are Ineffective Or Burdensome

The government argues that Section 1226(c) is justified because Congress found that individualized bond determinations were ineffective at ensuring appearance at hearings and protecting against recidivism. Pet. Br. at 8. The government's voluminous references to legislative history and studies do not support its claims.

1. First, the government's own numbers show that the overwhelming majority of aliens – specifically 80% – appear for removal proceedings as ordered. *See* Pet. Br. at 8, 19 (citing 20% failure-to-appear rate). Further, far from providing "specific evidence about the consequences of allowing discretionary release", Pet. Br. at 19, the government's statistical reports and data all suffer from

the same defect: they do not address the efficacy of individualized release determinations. *See* Pet. Br. at 19 (citing, *inter alia*, 20%, 42%, and 88% failure-to-appear rates); *id.* at 17 (citing 77% and 45% rearrest rates). All of the government's statistics were collected during a period of time when INS detention and release decisions were driven by the lack of INS detention space. As previously noted, criminal aliens were frequently not taken into INS custody at all, either because they were not identified before the expiration of their criminal sentences or because the INS lacked detention capacity. Even when aliens were detained and screened, release frequently was triggered by a shortage of detention space, with bonds set at artificially low amounts when detention space was lacking. *See* nn.7 & 8 and accompanying text, *supra*; *see also* Former INS Officers Amici (attributing high failure-to-appear rate to lack of detention space rather than failure of discretionary release judgments).

The government's heavy reliance on the Office of Inspector General's absconder study ("OIG study"), Pet. Br. at 19-20, is particularly misplaced because, in addition to the flaw affecting all the studies, the OIG study concerns only individuals who were already the subject of a final order of removal. That population is distinct from individuals like respondent who are contesting their removal and may never be subject to final orders. *See generally* Brief Amicus Curiae of American Bar Ass'n ("ABA Amicus").

2. The government also fails to provide any evidence that Congress specifically considered and rejected the accuracy of individualized release determinations. Instead, the government devotes most of its discussion of legislative history to making two undisputed general points: first, that Congress wanted to ensure the timely and efficient removal of criminal aliens when it enacted IIRIRA, Pet. Br. at 11-18; and second, that immigration detention is a necessary component of the removal process, Pet. Br. at 18-21. However, immigration detention is only necessary to that process when an alien is likely to flee or pose a danger to the community while proceedings are

pending. Those interests simply do not justify detention without individualized bond hearings.

Although this case pertains to the elimination of bond hearings for lawful permanent residents, the government relies on legislative history of bills that did not even propose eliminating bond determinations for that population, as well as legislative history of provisions wholly unrelated to immigration detention. For example, the government repeatedly cites to House Report No. 469, including for the proposition that "the INS's failure to detain aliens during their deportation proceedings was '[a] chief reason why many deportable aliens are not removed.'" Pet. Br. at 18-19 (citing H.R. Rep. No. 469, *supra* n.8, at 123). However, House Report No. 469 refers to House Bill 2202 (the predecessor of IIRIRA), which would have allowed for discretionary release of lawfully admitted aliens, including aliens convicted of aggravated felonies, during the pendency of deportation proceedings.[31] Other

[31] *See also* Pet. Br. at 16 (quoting Testimony of Doris Meissner, Commissioner, INS, Before the Senate Judiciary Comm. Concerning S. 269, the Immigrant Control and Financial Responsibility Act of 1995 and the Immigration Enforcement Improvements Act of 1995, 1995 WL 110438 (Mar. 14, 1995)) (one of two bills being considered, S. 269, did not contain any provisions for detaining aliens pending proceedings; Meissner's testimony supported the other bill being considered, H.R. 1929, which maintained Attorney General's discretion to release lawful permanent residents pending proceedings, including individuals convicted of aggravated felonies); Pet. Br. at 34-35 (citing and quoting *Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 36, 44 (1989) ("1989 House Hearing")) (provision being considered expanded arrest authority of INS; bill contained no provision for detention pending proceedings); Pet. Br. at 17, 34 (citing *Hearing on H.R. 723, et al., Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary*, 103d Cong., 124, 125, 171, 173, 181 (1994)) (provisions being considered in the government's excerpts, H.R. 3302 and H. Con. Res. 47, raised penalties for travel document fraud, and resolved that federal government should enforce immigration law, respectively; neither provision discussed

(Continued on following page)

citations refer to aliens who have been convicted of a narrower category of crimes than are encompassed by Section 1226(c),[32] not aliens who are lawful permanent residents and who have been convicted of any of a broad category of crimes, many relatively minor.

Even as to passages that do refer to detention without bond determinations, *see, e.g.,* Pet. Br. at 21, the legislative history reveals that Congress did not specifically address the success or failure of individualized release determinations.[33] Rather, Congress' focus, as reflected in

---

detention); Pet. Br. at 17-18, 34 (citing H.R. Rep. No. 22, 104th Cong., 2, 6-8, 12 (1995)) (amendments under consideration did not contain any detention provision); Pet. Br. at 35 (quoting 141 Cong. Rec. 4394-396 (1995)) (bill being considered did not include detention provision, and government quotes irrelevant statement of Sen. Kennedy about provision of bill that would "apply the RICO statute to alien smuggling crimes," 141 Cong. Rec. 4395); Pet. Br. at 18 (citing H.R. Rep. No. 645, 103d Cong., 4, 18, 21 (1994)) (report does not discuss detention pending immigration proceedings).

[32] The government cites to congressional statements about H.R. 3529 and S. 972, bills that required detention for individuals convicted of "murder, kidnapping, rape, or any attempt thereof, or any illicit trafficking in any controlled substance," and not the broad category of crimes encompassed by Section 1226(c). *See* Pet. Br. at 12-13 (quoting 133 Cong. Rec. 28,840, 28,841 (Statement of Rep. Smith)); Pet. Br. at 13 (quoting 133 Cong. Rec. 8771 (Statement of Sen. Chiles)).

[33] The government's citation to the 1993 Senate Hearing for the proposition that "the 1990 and 1991 amendments to the INA – which restored the possibility of bond for certain aggravated felons – had 'weakened substantially' the government's efforts to deport criminal aliens," Pet. Br. at 18, is misleading. The cited portion of the hearing merely noted that the 1991 technical amendments "weakened" the mandatory detention statute then in effect by allowing for discretionary release of some aliens who were *illegally* in the United States. *See* 1993 Senate Hearing, *supra* n.8, at 15, 26. No claim was made that the earlier 1990 amendment – which restored discretionary release for lawful permanent residents – had in any way "weakened" the government's enforcement efforts. The government's excerpted quote from H.R. Rep. 22 that "many [criminal aliens] who should be detained [during deportation proceedings] are released on bond," Pet. Br. at 18, is

(Continued on following page)

these and other sources cited by the government, was on failures of prior detention and removal schemes due to a myriad of administrative and managerial problems, including a failure to identify and apprehend criminal aliens before they were released from incarceration,[34] and a paucity of bed space that led to aliens being released irrespective of bond hearings.[35] *See* nn.7 & 8

---

not to the contrary. Although respondent was unable to locate this quote within the cited Report, it is entirely consistent with the fact that many criminal aliens were released on bond due to lack of detention space. *See* n.8, *supra*. The government's citation to a recommendation by the Congressional Task Force on Immigration Reform concerning mandatory immigration detention, Pet. Br. at 21, is similarly unhelpful. The explanation of the recommendation – which is all of three sentences – does not specify what evidence formed the basis for the recommendation or even what the Task Force contemplated when it referred to "mandatory detention" of aliens "awaiting formal deportation." 1995 Task Force Report, *supra* n.8, at 49.

[34] The government cites Senate Report No. 48 and the 1993 Senate Hearing repeatedly, including for those sources' recommendations that all aggravated felons be detained pending proceedings. *See* Pet. Br. at 21. However, these sources focus on, among other things, deficiencies in the INS's record-keeping system and the INS's failure to identify criminal aliens while they are serving their criminal sentences. *See* S. Rep. No. 104-48, at 2, 4, 14-18, 22 (1995); 1993 Senate Hearing at 5, 7, 17-19. *See also* Pet. Br. at 20 (quoting 1989 House Hearing, *supra* n.31, at 75, for statement by GAO official that "alternatives to detaining prisoners don't often work;" however, the official subsequently stated that "we are not necessarily suggesting that the INS should take custody of each criminal alien immediately upon their conviction," instead recommending "a way of tracking" criminal aliens).

[35] *See, e.g.,* Pet. Br. at 19, 21, 25 (citing S. Rep. No. 48, 104th Cong. (1995) (discussing, at 23, problems associated with lack of bed space, but cited in government brief to illustrate failure of INS to deport under prior scheme, as well as for recommendation for detention of all aggravated felons pending proceedings)); Pet. Br. at 21, 37-38 (citing 1993 Senate Hearing for statement that "release on bond . . . is . . . a problem" and for recommendation of mandatory detention; however, release of criminal aliens was attributed to, among other things, lack of bed space, *e.g.*, at 8, 21, 55, not inadequacies in bond hearings); Pet. Br. at 18-19 (citing H.R. Rep. No. 469, *supra* n.8, at 123) (discussing

(Continued on following page)

and accompanying text, *supra*; *see also* Point I.C.1., *supra* (discussing flaws in government statistics).[36]

3. In contrast, there is ample evidence that individualized bond determinations based on assessments of danger and flight risk are entirely consistent with the INS's criminal alien removal efforts, particularly in light of the tripling of INS detention space that has occurred within the past decade. *See* n.9, *supra*. Such individualized release determinations are an integral and effective part

problems associated with lack of bed space, but cited by government for proposition that INS's failure to detain was a "chief reason" for INS failure to deport); Pet. Br. at 17 (citing 141 Cong. Rec. 15018, 15038 (1995) (acknowledging that "[a]s a result" of inadequate bed space, criminal aliens are released, but cited by government for recidivism figures)); Pet. Br. at 20-21 (citing *Criminal and Illegal Aliens, Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 1996 WL 502071 (Sept. 5, 1996) (Statement of David A. Martin, General Counsel of INS) (discussing increase in removals due to increase in INS bed space and funding – and later urging repeal of mandatory detention provisions of AEDPA, but cited by government in support of proposition that "[w]itnesses before Congress who were intimately familiar with the problem of absconding criminal aliens confirmed the importance of detaining these aliens pending deportation")); *see also* 1989 House Hearing, *supra* n.31 (discussing problems with low bonds resulting in release, as cited in Pet. Br. at 21; however, these low bonds may have been due to lack of bed space, *see* n.8, *supra*).

[36] The limited legislative consideration of Section 1226(c) stands in stark contrast to the detailed legislative history that supported detention schemes that the Court has upheld as constitutional. *See, e.g., United States v. Salerno*, 481 U.S. 739, 742 (1987) (citing S. Rep. No. 98-225, which noted at 8 that the statute was "carefully drafted" given that "a pretrial detention statute may . . . be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect").

of our criminal justice system.[37] There is no evidence that they cannot operate just as effectively in the immigration context. The INS routinely makes individualized bond determinations in removal proceedings for aliens not subject to Section 1226(c) and immigration judges regularly review these determinations in brief, informal bond hearings. 8 C.F.R. 3.19. Requiring similar bond determinations for criminal aliens as well would place no additional administrative burden on the INS. Immigrants detained under Section 1226(c) can already appear before an IJ to seek review of the INS's determination that they are properly subject to the statute. Pet. Br. at 26. Incorporating danger and flight risk into this determination would not add any measurable cost or impose any delay.

The success of the two-year Transition Period Custody Rules and of the Vera Institute pilot project confirms that individualized release determinations can operate just as effectively for the population of immigrants with criminal convictions. *See* Vera Study, *supra* n.10, at 36 (showing 92-94% appearance rate for lawful permanent residents with criminal convictions); *see generally* ABA Amicus. Notably, the INA provides for discretionary release determinations for categories of aliens who pose a potentially far greater flight risk or danger. *See* Pet. App. 22a-23a (noting that 8 U.S.C. 1231(a) affords the same group of criminal aliens who are subject to mandatory detention during administrative removal proceedings, discretionary release from detention 90 days after they have received a final order of removal); *see also* 8 U.S.C. 506(a)(2) (authorizing discretionary release of lawful permanent residents charged in

[37] *See* Pretrial Services Act of 1982, Pub. L. No. 97-267, Section 2, 96 Stat. 1136 (codified at 18 U.S.C. 3152) (establishing pretrial services in each federal judicial district). *See also* Leonidas Ralph Mecham, Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts* 322, 325 (1998) (reporting 1,130 rearrests and 838 failures to appear out of 35,211 released).

Special Terrorist Removal Proceedings). Certainly, a statutory scheme that mandates detention of individuals convicted of minor crimes, while authorizing release of alien terrorists, is irrational and arbitrary. Thus, under any formulation, Section 1226(c) violates due process.[38]

II. SECTION 1226(c) SHOULD BE CONSTRUED NOT TO APPLY TO RESPONDENT

While the mandatory detention dictate of Section 1226(c) suffers from the constitutional infirmity demonstrated above, the Court may avoid deciding the constitutional issue in this case. Section 1226(c) applies only to an alien who "is deportable." Consistent with congressional intent and the doctrine of constitutional avoidance, the Court should construe that provision to require a final administrative order of removal before an alien is subject to mandatory detention. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[39] Because no such order has issued against respondent, he is not subject to mandatory detention under the statute.[40]

---

[38] Section 1226(c) also violates procedural due process because its prohibition of any individualized determination of danger and flight risk creates an unreasonably high risk that lawful permanent residents will be erroneously deprived of their liberty. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (setting forth procedural due process test); *see also Plasencia*, 459 U.S. at 34 (applying *Mathews* test to immigration proceedings).

[39] Such a construction would also avoid a conflict with international law prohibitions against arbitrary detention. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *see generally* Brief Amici Curiae of International Human Rights Organizations.

[40] For the reasons set forth in Point I., *supra*, Section 1226(c) would also raise profound constitutional issues as applied to aliens with final removal orders, but the Court need not address these issues here

(Continued on following page)

A. In IIRIRA, Congress Chose To Require Mandatory Detention Only If An Alien "Is Deportable"

In enacting the mandatory detention provision of IIRIRA, Congress chose a new standard for detention. Under its predecessor statutes, detention was triggered if an alien was "convicted" of certain offenses. In IIRIRA – for the first time – Congress changed the language, applying the detention provision not if an alien is "convicted," but if an alien "is deportable."

1. *Pre-IIRIRA Detention Statutes.* From 1988 through 1996, Congress enacted various detention provisions that applied to aliens with criminal convictions. In each instance, the detention provision applied to aliens who were "convicted" of designated offenses.

Congress' first mandatory detention statute, enacted in 1988, required that the Attorney General detain any alien "convicted" of designated offenses. 8 U.S.C. 1252(a)(2) (1989) (added by Anti-Drug Abuse Act of 1988, Section 7343(a), Pub. L. 100-690, 102 Stat. 4181). The provision did not provide any opportunity for release. The constitutionality of the 1988 mandatory detention provision was challenged in a number of courts, and the majority of courts that considered the issue struck the provision down as unconstitutional.[41]

In 1990, Congress amended this detention provision to restore the possibility of release for lawful permanent

---

because respondent is not subject to a final order. *See, e.g., Jones v. United States*, 529 U.S. 848, 860 (2000) (Thomas, J., concurring).

[41] *See, e.g., Fernandez-Santander v. Thornburgh*, 751 F. Supp. 1007 (D. Me. 1990), *vacated and remanded without opinion*, 930 F.2d 906 (1st Cir. 1991); *Kellman v. District Director, INS*, 750 F. Supp. 625 (S.D.N.Y. 1990); *Probert v. INS*, 750 F. Supp. 252 (E.D. Mich. 1990), *aff'd*, 954 F.2d 1253 (6th Cir. 1992); *Agunobi v. Thornburgh*, 745 F. Supp. 533 (N.D. Ill. 1990); *Leader v. Blackman*, 744 F. Supp. 500 (S.D.N.Y. 1990).

residents. 8 U.S.C. 1252(a)(2) (1991) (as amended by Immigration Act of 1990, Section 504, Pub. L. No. 101-649, 104 Stat. 4978). Like its predecessor, the provision applied to those aliens "convicted" of designated offenses, but it permitted the release of a lawful permanent resident if the alien was not a danger or flight risk. In 1991, Congress again amended the detention provision, further expanding the class of aliens eligible for release: after the 1991 amendments, any lawfully admitted alien who had been "convicted" of designated offenses could be released if the alien was not a danger or flight risk. 8 U.S.C. 1252(a)(2) (1992) (as amended by Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Section 306(a)(4), Pub. L. No. 102-232, 105 Stat. 1733). Then, in 1996, Congress passed Section 440(c) of AEDPA, which eliminated the release provision and, therefore, required mandatory detention. Like all of the predecessor statutes, detention under AEDPA was triggered if an alien was "convicted" of designated offenses.

2. *Legislative Evolution of IIRIRA.* In enacting IIRIRA, the House and the Senate considered competing proposals with significantly different detention and release provisions. The legislative history indicates that Congress rejected triggering mandatory detention on whether an alien is "convicted," but instead chose the term "is deportable" as part of a legislative compromise.

The House bill did not provide for mandatory detention. Under the House approach, detention was required for those aliens "convicted" of designated offenses. Significantly, however, the House bill provided for release of any lawfully admitted alien who did "not pose a danger to the safety of other persons or of property and [was] likely to appear for any scheduled proceeding." H.R. 2202, 104th Cong., Section 303 (passed by House and placed on calendar in Senate).[42] By contrast, under the Senate bill,

[42] On June 22, 1995, the House introduced H.R. 1915. Under H.R. 1915, the Attorney General was to take into custody any alien

(Continued on following page)

detention would have been mandatory (without the possibility of release for those who were not a danger or flight risk) for aliens "convicted" of certain crimes. S. 1664, 104th Cong., Section 164(b), (e) (reported in Senate) (requiring detention of "specially deportable criminal alien[s]," defined as those "convicted" of designated offenses).[43]

The bill that emerged from Conference represented a legislative compromise. On the one hand, the bill provided for detention without the opportunity for release for those aliens who were not a danger or flight risk. H.R. Conf. Rep. No. 104-828, Section 303, at 39 (1996). But – for the first time – the detention provision was not triggered if an alien was "convicted" of certain crimes, but, rather, if he "is deportable." *Id.*[44]

B. Under The Statute, An Alien "Is Deportable" Only After There Is A Final Order Of Deportation

Consistent with congressional intent as reflected by this congressional compromise, this Court should construe

"convicted" of designated offenses. H.R. 1915, 104th Cong., Section 303 (introduced in House). This bill, however, provided for release of a lawfully admitted alien as long as he could demonstrate that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." *Id.* On August 4, 1995, the House reintroduced H.R. 1915 as H.R. 2202, with the identical detention provision. H.R. 2202, 104th Cong., Section 303 (introduced in House). On March 4, 1996, the House Judiciary Committee reported H.R. 2202 favorably out of committee, H.R. Rep. No. 104-469, pt. I, and on March 21, 1996, the House passed H.R. 2202.

[43] On April 10, 1996, S. 1664 was reported out of committee, S. Rep. No. 104-249, and, on May 2, 1996, the Senate passed the language contained in S. 1664.

[44] In light of this legislative evolution, the government's reliance on certain legislative history sources is baffling. The government relies on the House Report on H.R. 2202 (H.R. Rep. No. 104-469) for support of mandatory detention, Pet. Br. at 16, 19, 34, 35, but, as noted, H.R. 2202 did not require mandatory detention.

the term "is deportable" to require a final administrative order before an alien is subject to mandatory detention. Although the term "is deportable" is used in different ways within the INA, one meaning under the statute is that an alien "is deportable" only after the issuance of a final removal order. For example, in 1996, Congress defined an order of deportation as a decision of an officer to whom the Attorney General "has delegated the responsibility for determining whether an alien is deportable;" this order becomes final when the BIA makes "a determination" that the order should be affirmed (or if the time for review elapses). 8 U.S.C. 1101(a)(47) (added by AEDPA Section 440(b)). Only then has the agency decided that an alien is deportable within the meaning of the statute. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (final agency action is the "consummation of the agency's decisionmaking process" such that "legal consequences will flow" from the action) (citations omitted).[45] This is particularly true for lawful permanent residents such as respondent, who retain their legal status until there is a final administrative order of deportation. 8 C.F.R. 1.1(p); *see also In re Lok*, 18 I. & N. Dec. 101, 105 (BIA 1981).

[45] The INA uses "is deportable" (as well as the related term "is removable," *see* 8 U.S.C. 1229a(e)(2)(B)), in other ways as well. For example, sometimes the term appears to refer to an IJ's determination whether an alien falls within the class of aliens who are subject to deportation, *e.g.*, 8 U.S.C. 1229b, while other times it appears to refer to the IJ's order of deportation, *e.g.*, 8 U.S.C. 1229a(c)(1)(A); 1229a(c)(5)(A). Additionally, the statute uses the term to define the "classes of . . . aliens" subject to deportation if the facts are proven. 8 U.S.C. 1227(a). These various meanings of "is deportable" in the statute demonstrate the ambiguity of the term, and underscore that there are various interpretations of the term that are "fairly possible" under the statute. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' *see Crowell v. Benson*, 285 U.S. 22, 62 (1932), we are obligated to construe the statute to avoid such problems.").

Under this construction, Section 1226 covers a gap that would otherwise exist in the statutory scheme created by 8 U.S.C. 1231 (the provision that this Court interpreted in *Zadvydas*). While Section 1231 generally governs post-final order detention, it does not, by its plain language, cover those aliens who are seeking judicial review and have received judicial stays pending review. According to the language of Section 1231, that provision applies to detention during the "removal period," but the removal period does not begin until "the *latest of the following*: (i) [t]he date the order of removal becomes administratively final; [or] (ii) [i]f the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order." 8 U.S.C. 1231 (emphasis added). Thus, under the plain terms of Section 1231, if a court orders a stay of removal, Section 1231 does not authorize detention.

Section 1226(a) and (c) cover this gap in the statutory scheme, providing the authority to detain aliens who seek judicial review and are granted judicial stays pending review. Aliens are subject to Section 1226 until Section 1231 takes effect – which, for aliens who have judicial stays, is not until the date of the court's order. Under Section 1226(a), the INS is authorized (but not required) to detain an alien "pending a decision" (a term that, under its plain meaning, encompasses a BIA decision or a federal court decision). If an alien has a judicial stay and is described in Section 1226(c), that alien is subject to mandatory detention. 8 U.S.C. 1226(a) (subsection (a) applies "[e]xcept as provided in subsection (c)"). On the other hand, if the alien has a judicial stay but is *not* within the class of aliens described in Section 1226(c), that alien remains subject to discretionary detention under Section 1226(a). Indeed, unless Section 1226(a) continues to cover this group, there would be no statutory authority to detain this category of aliens (*i.e.*, aliens with stays pending judicial review who are not described in Section 1226(c)),

an anomaly that would appear to be inconsistent with Congress' intent.[46]

In addition to the statutory language, there are a number of reasons to conclude that Congress, in passing mandatory detention, was targeting aliens with final orders who were seeking judicial review. First, the legislative record reveals that Congress believed that the risk of flight increases significantly once a final order of deportation has been entered. According to one hearing (also cited by the government), while only 20% of aliens failed to appear during administrative proceedings, nearly 90% failed to appear after a final order of deportation. 1993 Senate Hearing, *supra*, n.8, at 21; *see also* Pet. Br. at 19-20. Congress thus imposed mandatory detention on those aliens it believed were most likely to flee. *But see* Point I.C.1., *supra* (explaining flaws in these statistics).

Second, Congress made other changes in IIRIRA that are consistent with the choice to subject criminal aliens to mandatory detention pending judicial review. Importantly, Congress intended that many criminal aliens would have final orders of deportation by the time they finish serving their criminal sentences and, therefore, would be immediately subject to Section 1226(c). In IIRIRA, Congress strengthened the Institutional Hearing Program, under which removal proceedings were to take place while an alien was still in criminal custody. 8 U.S.C. 1228. The statute explicitly states that, for aliens convicted of aggravated felonies, the Attorney General shall, to the extent possible, "complete[ ] ... removal proceedings, and any administrative appeals thereof ... before the alien's release from incarceration." 8 U.S.C. 1228(a)(3)(A).

---

[46] The government avoids this anomaly by arguing that Section 1231 applies to all aliens with final orders, including those who have judicial stays pending review. As noted, this interpretation is not supported by the plain language of the statute.

Congress also made a significant change to the INA by amending the law to permit an alien to challenge a final order from outside the United States. *See* 8 U.S.C. 1252 (replacing 8 U.S.C. 1105a); 8 U.S.C. 1105a(c) (1994) (under previous statute, "[a]n order of deportation ... shall not be reviewed by any court if the alien ... has departed from the United States after the issuance of the order"). Thus, Congress intended that, after IIRIRA, an alien who challenges his final order would be able to leave the country and continue his judicial challenge without prejudicing his legal rights. Under this scenario, mandatory detention would not force individuals to choose between prolonged detention and forfeiting their legal claims.

Third, when Congress designed the special alien-terrorist removal procedures in AEDPA, it mandated detention only for those aliens who had been ordered removed and whose orders were pending a judicial appeal. *See* 8 U.S.C. 1531-1537. Significantly, the alien-terrorist provisions *permit* release of a lawful permanent resident who is accused of being a terrorist during the course of removal proceedings, so long as he can demonstrate that he is not a danger, a flight risk, or a threat to national security. 8 U.S.C. 1536(a)(2) ("An alien lawfully admitted for permanent residence shall be entitled to a release hearing before the judge assigned to hear the removal hearing."). For these aliens, mandatory detention is triggered only after a decision has been made (by an Article III judge): "If the alien was released pending the removal hearing, the judge shall order the Attorney General to take the alien into custody." 8 U.S.C. 1534(i). Accordingly, for these alien terrorists, detention is mandatory only pending an appeal: "If the judge decides that an alien shall be removed, the alien shall be detained pending the outcome of any appeal." 8 U.S.C. 1537(b)(1). It would be bizarre to conclude that Congress provided release provisions that were more permissive for terrorists than for those aliens charged with deportability for having committed ordinary crimes.

Finally, by choosing to apply mandatory detention only to those who have received final administrative orders of removal, Congress employed a distinction that already had legal and administrative significance. *See Bennett*, 520 U.S. at 177-78; *see also* 8 C.F.R. 1.1(p) (lawful permanent resident status terminates with issuance of a final administrative order); 8 C.F.R. 3.6(a) (automatic stay of deportation pending issuance of final administrative order).

The government's reading of Section 1226(c) fails to give effect to Congress' decision to replace the term "convicted" (used in previous statutes) with IIRIRA's new term "is deportable."[47] In the government's view, an alien is subject to mandatory detention once the government charges the alien with deportability for having been convicted of a crime, unless the alien can prove that the government is "substantially unlikely" to establish the charge. *See In re Joseph*, 22 I. & N. Dec. 799, 805 (BIA 1999). The government's position is inconsistent with the statute, which states that the charging document merely sets out allegations, 8 U.S.C. 1229(a)(1)(D) (notice to appear sets out the "*charges* against the alien and the statutory provision *alleged* to have been violated") (emphasis added), and *commences* the proceeding for determining whether an alien is deportable, *see* 8 U.S.C. 1229a.

[47] The Ninth Circuit's interpretation similarly fails to give content to Congress' use of the term "is deportable." While the Ninth Circuit recognized that "is deportable" could have different meanings, the court rejected respondent's interpretation, concluding that it was incompatible with Section 1226(c)'s requirement that aliens be taken into custody "when released" from criminal incarceration. Pet. App. at 28a-29a. This reading, however, ignores Congress' emphasis on prison deportation proceedings and its expectation that, in many cases, criminal aliens would have a final order of deportation before they left criminal custody, 8 U.S.C. 1228, and, therefore, would be immediately subject to Section 1226(c) upon release. In addition, the BIA has interpreted the "when released" language to apply to aliens who have not been taken into custody immediately upon release from criminal incarceration. *In re Rojas*, 23 I. & N. Dec. 117 (BIA 2001).

Moreover, the additional review supposedly offered by *In re Joseph* does not purport to give any content to the term "is deportable" (as opposed to "convicted"), and offers little more than the requirement that the government must have a good faith basis to file a charging document. It would hopefully be the rare case in which the government brings a charge so baseless that the alien would prevail under this standard.[48]

[48] The government's argument also renders meaningless provisions of the Transition Period Custody Rules ("TPCR"), which were designed to cover the transition from AEDPA to IIRIRA. The TPCR appears to be contradictory on its face: an alien "convicted" of an aggravated felony was subject to detention and could not be released, IIRIRA Section 303(b)(3)(A)(i), (B), but an alien who "is deportable" by reason of having committed an aggravated felony could be released, IIRIRA Section 303(b)(3)(A)(iii), (B). Under the government's reading – which attributes no difference to Congress' use of "convicted" and "is deportable" – there is no way to reconcile these provisions, and release would be both permitted and prohibited for an alien convicted of an aggravated felony. Indeed, the BIA, faced with the apparent incongruity, effectively read section (i) out of the statute. *In re Noble*, 21 I. & N. Dec. 672, 684 (BIA 1997) ("The parties have not offered, nor have we identified, a sensible way of construing the statute so as to give effect to both" (A)(i) and (A)(iii).).

The TPCR should be understood as a transitional provision between the harsher detention statute of AEDPA and the more moderate provision of IIRIRA. At the time the TPCR was enacted, aliens were already in custody under AEDPA Section 440(c), which required mandatory detention for aliens "convicted" of certain crimes. Subsection (i) of the TPCR – which, like AEDPA, applied to aliens who had been "convicted" of crimes – targeted a subset of the aliens already in custody under AEDPA Section 440(c) (*i.e.*, aggravated felons), and prohibited their release. IIRIRA Section 303(b)(3)(B). Subsection (iii) applied to those aliens who were to be detained in the future (including aggravated felons), as well as to the non-aggravated felons in custody under AEDPA. This reading makes sense of the fact that Congress listed aggravated felons in both (i) (and prohibited release) and (iii) (and provided for release), and recognizes that the TPCR was designed, as its name suggests, as a "transition[al]" provision between AEDPA Section 440(c) and the new standard articulated in IIRIRA.

The crux of the government's argument is that, once the INS charges an alien with deportability, it is virtually inevitable that the alien will be deported. *See* Pet. Br. at 41 (asserting that, once the INS charges an alien, it is "very likely" that a final order will be entered, and analogizing pre-final order detention to the post-final order detention considered in *Zadvydas*). But that is not so: some aliens will be eligible for relief, while others, like respondent, may not even be within the class of aliens subject to deportation. *See* Point I.B.2., *supra*. Rather than requiring mandatory detention based on the INS's mere say-so, Congress required a final administrative order of removal before an alien could be subject to Section 1226(c).

CONCLUSION

For the reasons and upon the authorities cited above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

LILIANA M. GARCES
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
405 14th Street, Suite 300
Oakland, California 94612

JAYASHRI SRIKANTIAH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
1663 Mission Street, Suite 460
San Francisco, California 94103

BRIAN CONDON
ARNOLD & PORTER
777 S. Figueroa Street, 44th Floor
Los Angeles, California 90017

JUDY RABINOVITZ
Counsel of Record
LUCAS GUTTENTAG
LEE GELERNT
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2618

A. STEPHEN HUT, JR.
CHRISTOPHER J. MEADE
GREGORY S. CHERNACK
KATHERINE A. FLEET
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

Supreme Court, U.S.
FILED
NOV 27 2002

No. 01-1491

In the Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HYUNG JOON KIM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

		Page
A.	Aliens in removal proceedings have no absolute entitlement to individualized bond orders	2
B.	The legislative judgments underlying Section 1226(c) are entitled to judicial deference	5
C.	The legislative findings underlying Section 1226(c) are based on concrete historical evidence	8
D.	Section 1226(c) does not authorize "indefinite" detention	14
E.	Possible challenges to removal do not render Section 1226(c) unconstitutional	16
F.	Respondent's alternative reading of Section 1226(c) is not plausible	18
Conclusion		20

TABLE OF AUTHORITIES

Cases:

Carlson v. *Landon*, 342 U.S. 524 (1952)	3, 7, 8
Chaffin v. *Stynchcombe*, 412 U.S. 17 (1973)	15
De La Cruz v. *INS*, 951 F.2d 226 (9th Cir. 1991)	17
Fiallo v. *Bell*, 430 U.S. 787 (1977)	5, 7
Galvan v. *Press*, 347 U.S. 522 (1954)	6
Hoang v. *Comfort*, 282 F.3d 1247 (10th Cir. 2002), petition for cert. pending, No. 10-1616 (filed May 3, 2002)	18
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	18
INS v. *Chadha*, 462 U.S. 919 (1983)	6
INS v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991)	3
INS v. *St. Cyr*, 533 U.S. 289 (2001)	17
Jackson v. *Indiana*, 406 U.S. 715 (1972)	8
McGautha v. *California*, 402 U.S. 183 (1971)	15
Parra v. *Perryman*, 172 F.3d 954 (7th Cir. 1999)	16
Reno v. *Flores*, 507 U.S. 292 (1993)	3, 4, 5, 7, 14

Cases—Continued: Page

Rostker v. *Goldberg*, 453 U.S. 57 (1981) 6, 7
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) 2, 3
United States v. *Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) 17
United States v. *Esparza-Ponce*, 193 F.3d 1133 (9th Cir. 1999), cert. denied, 531 U.S. 842 (2000) 17
United States v. *Salerno*, 481 U.S. 739 (1987) 14
Welch v. *Ashcroft*, 293 F.3d 213 (4th Cir. 2002) 18
Zadvydas v. *Davis*, 533 U.S. 678 (2001) 2, 5, 6, 8, 14, 19

Constitution and statutes:

U.S. Const. Art. III 13
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 10
§ 303(b), 110 Stat. 3009-586 (8 U.S.C. 1226(c) note) 11
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(43) 13
8 U.S.C. 1101(a)(43)(G) 12
8 U.S.C. 1158(b) 17
8 U.S.C. 1158(b)(2) 18
8 U.S.C. 1182(c) (1994) 17
8 U.S.C. 1226 ..... 19, 20
8 U.S.C. 1226(a) 19
8 U.S.C. 1226(a)(2) 19
8 U.S.C. 1226(c) ..... *passim*
8 U.S.C. 1226(c)(1) 17, 19
8 U.S.C. 1226(c)(1)(B) 12, 17
8 U.S.C. 1226(c)(1)(C) 12
8 U.S.C. 1226(c)(2) 19
8 U.S.C. 1227(a)(2)(A)(i) 12
8 U.S.C. 1227(a)(2)(A)(ii) 12, 17
8 U.S.C. 1228(a)(2) 15

Statutes—Continued: Page

8 U.S.C. 1228(a)(3) 12
8 U.S.C. 1229b 17
8 U.S.C. 1231(a) 18, 19, 20
8 U.S.C. 1231(a)(1)(C) 20
8 U.S.C. 1231(a)(2) 2, 19
8 U.S.C. 1231(a)(6) 19
8 U.S.C. 1231(b)(3)(B) 18
8 U.S.C. 1362 15
8 U.S.C. 1531(1) 13
8 U.S.C. 1532 13
8 U.S.C. 1533 13
8 U.S.C. 1536 ..... 13, 14
18 U.S.C. 3143(b)(2) 4-5
18 U.S.C. 3145(c) 4-5
Ark. Code Ann. (Michie Supp. 1987):
§ 16-91-110(b)(2) 5
§ 16-91-110(b)(3) 5
Ga. Code Ann. § 17-6-1(g) (1997) 5
Okla. Stat. Ann. tit. 22, § 1077 (West 1986) 5

Miscellaneous:

General Accounting Office:
No. GAO/GGD-92-85, *Immigration Control: Immigration Policies Affect INS Detention Efforts* (June 25, 1992) 7, 9, 10, 15
No. GAO/T-GGD-99-47, *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement* (Feb. 25, 1999) 9
1 Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* (Aug. 1, 2002) 11, 12
H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1 (1996) 7, 8

In the Supreme Court of the United States

No. 01-1491

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HYUNG JOON KIM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

In 1996, Congress adopted the mandatory detention requirement of 8 U.S.C. 1226(c) because it concluded that the prior regime of bond orders and other conditions of release had failed to ensure that criminal aliens would appear for their deportation proceedings, or for actual removal from the United States if a final order of deportation was entered against them. Congress further concluded that the demonstrated failure of individualized bond orders endangered public safety and welfare, and impaired the Nation's sovereign power to determine what aliens should be removed from the United States.

Respondent accepts "the government's authority to use detention to ensure the appearance of immigrants at their hearings * * * or to protect the public." Br. 1. Respondent's core argument, therefore, is that this Court should override Congress's assessment that detention of the criminal aliens specified in 8 U.S.C. 1226(c) during the pendency of their removal proceedings is necessary and appropriate to safeguard the sovereign right of removing dangerous and

undesirable aliens. Congress's assessment, however, is amply supported by the legislative record and entitled to deference under this Court's cases.

A. ALIENS IN REMOVAL PROCEEDINGS HAVE NO ABSOLUTE ENTITLEMENT TO INDIVIDUALIZED BOND ORDERS

Respondent urges (Br. 16) a bright-line constitutional rule that "any detention scheme" violates due process unless the government justifies detention with an "individualized showing" about the need to detain the "particular person" in custody. Respondent cites no case that states such a bright-line rule. His new rule is particularly unfounded as applied to Section 1226(c), because the persons in custody are not citizens and may never have been admitted into the United States, see Gov't Br. 44-45; mandatory detention is based on prior criminal convictions that were obtained after full criminal process, see *id.* at 41-42; detention lasts only for the limited duration of administrative removal proceedings, which are streamlined and expedited for aliens who are detained, see *id.* at 5 n.4, 26-31, 39-40; and the criminal aliens in custody have little chance of avoiding removal, and may end their detention by agreeing to depart the United States, see *id.* at 27-31, 46-47.

1. This Court has recognized that removable aliens may be detained based on reasonable categorical judgments. In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), for example, the Court did not discern any constitutional problem with *mandatory* detention of criminal aliens during the 90-day "removal period" that follows a final order of removal. *Id.* at 683, 699, 701 (noting that aliens must be detained during removal period, but finding no "serious constitutional threat" based on that detention); see 8 U.S.C. 1231(a)(2). *Zadvydas* also affirmed (533 U.S. at 692-694) the continued vitality of *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), in which the Court held that the fact that an alien has been apprehended at the border without authorization to enter the United States is sufficient to justify detention without an individualized hearing. See *Mezei*, 345 U.S. at 212-215.

In *Carlson* v. *Landon*, 342 U.S. 524 (1952), the Court upheld detention during deportation proceedings based on determinations by the Attorney General that the aliens were active in the Communist Party. *Id.* at 541. Rather than requiring the Attorney General to produce individualized evidence that detention of each alien in that category was necessary to prevent the alien from fleeing or committing crimes before deportation proceedings were completed, as had been urged by the aliens and ordered by the courts below (see *id.* at 528-534), this Court determined that detention without bail was justified by "*Congress' understanding* of [Communists'] attitude toward the use of force and violence * * * to accomplish their political aims." *Ibid.* (emphasis added); see also *id.* at 558-559, 568 (Frankfurter, J., dissenting). As the Court explained in *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991), "[w]hat was significant in *Carlson* was not simply the threat of 'active subversion,' but rather the fact that Congress had enacted legislation based on its judgment that such subversion posed a threat to the Nation." *Id.* at 193.[1]

Reno v. *Flores*, 507 U.S. 292 (1993), likewise stands for the proposition that, in the immigration area, detention may be

---

[1] Respondent claims (Br. 23) that *Carlson* was not briefed as a challenge to "a 'mandatory' or 'blanket' detention policy." In fact, the unsuccessful argument of the petitioners in *Carlson* was remarkably similar to respondent's argument in this case. The *Carlson* petitioners contended that legislative determinations could not justify "depriving [an alien] of his liberty without facts personal to the individual." Br. for Pet. at 12, *Carlson*, *supra* (No. 35). They further argued that Congress's legislative determinations about alien Communists did not hold true in their particular cases and, therefore, the Attorney General's denial of bail based on Congress's determinations was unlawful. *Id.* at 21-28.

based upon "reasonable presumptions and generic rules." *Id.* at 313. In *Flores* the Court specifically rejected the argument that, when deciding between institutional placement of unaccompanied juveniles and placement with a relative or other guardian, the INS could not "rely on categorical distinctions." *Id.* at 311 n.6 (brackets and internal quotation marks omitted). Respondent attempts (Br. 20) to distinguish *Flores* as a case involving juveniles, but the Court was clear that for the juveniles who were aliens, that alien status was dispositive for its due process analysis. 507 U.S. at 305 ("If we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles * * * who are aliens."). Furthermore, although respondent is correct (Br. 20 n.14) that the INS's detention decisions in *Flores* were reviewable (see 507 U.S. at 308-309), that is true of Section 1226(c) detention as well. An alien covered by Section 1226(c) is ensured an opportunity for an individualized determination by an immigration judge (IJ) and the Board of Immigration Appeals (BIA) whether he is within one of the categories of criminal aliens about whom Congress made a legislative judgment that detention is necessary and appropriate to ensure proper enforcement of the immigration laws and to protect the community. See Gov't Br. 26-27. The important point is that, in *Flores* and under Section 1226(c), reasonable categorical classifications are acceptable grounds for detention.

2. Outside the immigration context, federal and state practice confirms that detention permissibly may be based on legislative determinations about the significance of a criminal conviction. Federal law, for example, requires detention pending appeal of defendants who have been sentenced to a prison term for a crime of violence or other specified crime, unless the defendant shows (among other things) "exceptional reasons" for his release. 18 U.S.C.

3143(b)(2), 3145(c). Contrary to respondent's proposed rule (see Br. 16), a defendant who is appealing his conviction for one of the statutorily specified crimes cannot obtain release merely by showing that he is not dangerous or a flight risk. Analogous state statutes likewise prohibit release pending appeal, based on categorical legislative determinations about the significance of the conviction that is under appeal. See, *e.g.*, Ark. Code Ann. § 16-91-110(b)(2), (3) (Michie Supp. 1987); Ga. Code Ann. § 17-6-1(g) (1997); Okla. Stat. Ann. tit. 22, § 1077 (West 1986).

B. THE LEGISLATIVE JUDGMENTS UNDERLYING SECTION 1226(c) ARE ENTITLED TO JUDICIAL DEFERENCE

Respondent argues (Br. 21-25) that the Court should attach no significance to the immigration context in which this case arises. As already explained, however, the political Branches' plenary power over immigration, and the lesser due process protection afforded to aliens as opposed to citizens, are highly relevant to this Court's assessment of immigration-related detention. See Gov't Br. 23, 25, 31-33, 44-47. Furthermore, categorical legislative determinations of the sort underlying Section 1226(c) are an inherent and well-accepted feature of immigration law. As the Court emphasized in *Flores*, "in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens." 507 U.S. at 305-306 (quoting *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977)) (internal quotation marks omitted); see *Zadvydas*, 533 U.S. at 700 (judicial review of post-removal-order detention "must take appropriate account" of the political Branches' responsibility for, and expertise in, immigration matters and related policy judgments).

1. Respondent says (Br. 22-23) that judicial deference in the immigration area reaches only Congress's substantive decisions to exclude or expel aliens, and not the imple-

mentation of those decisions. But the cases on which respondent relies stand for the very different proposition that the implementation of Congress's decisions about which categories of aliens will be excluded or expelled (unlike those decisions themselves) is not *entirely* beyond judicial review. See *Zadvydas*, 533 U.S. at 695; *INS* v. *Chadha*, 462 U.S. 919, 941-942 (1983); *Galvan* v. *Press*, 347 U.S. 522, 531 (1954). The government does not dispute the availability of judicial review for compliance with the Due Process Clause in this case. The issue, instead, is whether that due process analysis should recognize Congress's particular power and expertise to determine whether the undeniable risk associated with releasing aggravated felons and other criminal aliens during the pendency of proceedings instituted to remove them from the United States undermines the Nation's immigration policies and control of the Nation's borders. See Gov't Br. 15-17. That determination about what steps are needed to make Congress's exclusion and expulsion policies effective is subject to highly deferential judicial review. Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 67-68 (1981) ("We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice. * * * [W]e must be particularly careful not to substitute our judgement of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.").

2. The evidence before Congress in 1996 was that criminal aliens' failure to appear for deportation proceedings endangered the public and encouraged illegal immigration into the United States. Congress also was anxious to speed the removal of criminal aliens so that the Nation could devote its limited capacity to accept resident aliens to the admission of additional law-abiding aliens. See Gov't Br. 15-18 (discussing legislative findings). Mandatory detention of

removable criminal aliens was intended to, and does, address those problems. See, *e.g.*, H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 111 (1996) ("[O]ur immigration laws should enable the prompt admission of those who are entitled to be admitted, the prompt exclusion or removal of those who are not so entitled, and the clear distinction between these categories.").[2]

Just as the draft-registration criteria in *Rostker* could not be separated for purposes of due process analysis from the conduct of actual military operations in which the draftees would engage (see 453 U.S. at 68-69), it is "blinking reality" (*id.* at 68) for respondent to contend (Br. 22-23) that detention in aid of removal is separable from Congress's power over immigration policy. "Detention is necessarily a part of th[e] deportation procedure." *Carlson*, 342 U.S. at 538. Like the policy concerning detention of juveniles considered in *Flores*, the detention policy expressed in Section 1226(c) was adopted in Congress's "exercise of its broad power over immigration and naturalization" (507 U.S. at 305 (quoting *Fiallo*, 430 U.S. at 792) (internal quotation marks omitted)), and therefore is subject to "unexacting" rational-basis review (507 U.S. at 306).

In arguing to the contrary, respondent misses the critical point of *Zadvydas*. See Resp. Br. 22-23. In that case, the Court determined that the discretionary detention of deportable aliens after their final orders of removal "ha[d] as its

---

[2] A 1992 General Accounting Office (GAO) Report on which respondent relies (Br. 6 n.7, 7 n.9) emphasized that detention of deportable aliens was "part of the larger enforcement questions relating to aliens—preventing aliens from illegally entering the country and removing those who do not have a legal basis to remain." GAO, No. GAO/GGD-92-85, *Immigration Control: Immigration Policies Affect INS Detention Efforts* 35 (June 25, 1992) (*1992 GAO Report*). The GAO report noted specific instances in which policies requiring detention of certain groups of removable aliens contributed to a reduction in immigration violations. See *id.* at 35-36.

basic purpose effectuating [the] alien's removal." 533 U.S. at 697. Once removal could not be accomplished, the Court found no "reasonable relation" between continued detention and that immigration policy. *Id.* at 690 (quoting *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972)). The Court also concluded that the aliens' dangerousness was not *alone* sufficient to support "potentially permanent" confinement. *Id.* at 691. In this case, by contrast, detention during administrative removal proceedings directly serves Congress's immigration objectives of assuring the aliens' presence at those proceedings and the aliens' "prompt exclusion or removal" (H.R. Rep. No. 469, *supra*, at 111) if they are ordered removed, and it does not present the problem of "potentially permanent" detention that concerned the Court in *Zadvydas* (see Part D, *infra*).

3. Respondent further suggests (Br. 24-25) that courts should give less deference to the political Branches' plenary power over immigration in a case involving a permanent resident alien. Although respondent's immigration status is relevant to determining his protectable interests (see Gov't Br. 44-45), it does not affect the deference due to Congress's judgments. As the Court explained in *Carlson*, aliens who "fail to obtain and maintain citizenship by naturalization * * * remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." 342 U.S. at 534. That "plenary power of Congress" underlies the requirement of judicial deference.

C. THE LEGISLATIVE FINDINGS THAT SUPPORT SECTION 1226(c) ARE BASED ON CONCRETE HISTORICAL EVIDENCE

The record before Congress established that between 20% and 42% of criminal aliens whom the INS did not keep in custody failed to appear for their deportation proceedings, and approximately 90% of aliens who were not detained failed to

report for their actual deportation. Gov't Br. 19-20. Adding to the problem, most criminal aliens (about 80%) were recidivists. *Id.* at 17.[3]

1. Respondent contends (Br. 34) that the legislative record "d[id] not address the efficacy of individualized release determinations," because it was "collected during a period of time when INS detention and release decisions were driven by the lack of INS detention space," not by individualized determinations of flight-risk and danger to the community (as the law then required, see Gov't Br. 12-15). Respondent's suggestion that capacity-related releases inflated the observed flight-rate for criminal aliens is entirely speculative, and highly dubious. Although the INS sometimes set terms of release in light of its limited detention space, INS prioritized its use of available space. "As detention space bec[ame] limited, INS release[d] aliens who [we]re lower under its priority criteria in order to detain aliens who [we]re higher (e.g., aggravated felons)." *1992 GAO Report* 25. Lower-priority aliens such as non-criminal aliens who had been ordered deported, aliens apprehended while entering the United States illegally, and aliens detained for working without authorization, were released to make room for aliens with criminal convictions. See *id.* at 14; see also *id.* at 35 ("INS generally followed its detention criteria."). Even when shortages of detention space did affect detention of

---

[3] Amicus ABA wrongly suggests (Br. 4) that the INS has identified "a recidivism rate of just 1.25%" for alien aggravated felons after the completion of their criminal sentences. The GAO report on which the ABA relies tabulated only post-incarceration recidivism that was recorded in INS databases. GAO, No. GAO/T-GGD-99-47, *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement* 3, 4 (Feb. 25, 1999). The GAO did not consider aliens' actual criminal histories, or likely future recidivism by aliens who had been released from prison very recently. Furthermore, the figure cited by the ABA is for post-incarceration *felony convictions* known to the INS, not arrests, pending charges, total convictions, or other indications of recidivism by the released aliens. See *id.* at 3.

criminal aliens, the INS made room for felons and aliens convicted of other serious crimes. See *id.* at 43. Thus, there is no basis to conclude that the INS's lack of detention space generally affected bond determinations for criminal aliens, and particularly for aggravated felons like respondent.

Furthermore, and as respondent himself emphasizes (Br. 36-37 & n.35), Congress was well aware in 1996 that the INS needed additional detention space to carry out its mandate of removing criminal aliens. Congress provided funding for the additional space. See *id.* at 7. Congress, however, had been advised—by the Congressional Task Force on Immigration Reform and others who were thoroughly familiar with the INS's difficulties in removing criminal aliens (such as investigators from the GAO and the Justice Department, a federal prosecutor, and a representative from the Executive Office for Immigration Review)—that detention of criminal aliens during their removal proceedings was the only certain cure for criminal aliens' unacceptable flight rate. See Gov't Br. 20-21.[4]

Respondent is demonstrably wrong when he contends (Br. 34-38) that Congress never decided whether adding detention space would suffice to ensure criminal aliens' appearance for removal proceedings and their ultimate removal from the United States, without also providing for mandatory detention. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, provided the Attorney General the option of invoking, for a period of up to two years, transitional custody rules that delayed expansions of the class of

[4] Congress compiled testimony and other evidence about detention of criminal aliens over several years, and sometimes in connection with bills that would not have required mandatory detention. See Resp. Br. 35-36, 43 n.44. But Congress's consideration and rejection of lesser alternatives to mandatory detention on that record strengthens, rather than weakens, the case for deference to Congress's ultimate determination that mandatory detention is necessary.

removable criminal aliens subject to mandatory detention, and allowed the Attorney General to release criminal aliens who were not aggravated felons if he determined that they would not present a danger to the safety of other persons or property and would be likely to appear for their removal proceedings. IIRIRA § 303(b), 110 Stat. 3009-586 (*reprinted in* 8 U.S.C. 1226(c) note); see Gov't Br. 37. Congress thus required mandatory detention of aggravated felons even if the INS had an overall shortage of detention space. For other criminal aliens, Congress adopted as a temporary half-measure the regime urged by respondent—individualized bond determinations and an expansion of INS detention capability. But Congress required mandatory detention of specified criminal aliens who were not aggravated felons as soon as the necessary detention space could be secured (and in any event no later than two years after Section 1226(c) initially was to take effect), thus manifesting its judgment that, even with ample detention space, individualized bond determinations for the specified criminal aliens do not allow an effective immigration policy or sufficiently protect the public.[5]

[5] A report cited by respondent (Br. 7-8, 39) indicates that, during the period of the transitional detention rules, 23% of criminal aliens released on parole or bond in New York failed to appear for their deportation hearings, and 66% failed to appear for actual removal from the United States. 1 Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* 8-9, 36, 38 (Aug. 1, 2000). Respondent cites that report as evidence of an alternative to mandatory detention—a pilot program under which a pre-screened group of aliens (see *id.* at 13 (screening criteria)) was released by the INS and "required to report regularly to supervision officers in person and by phone" (*id.* at 2). For high-priority participants such as aggravated felons who were admitted to the program before the mandatory detention requirement took effect (see *id.* 11, 34), program staff "monitored [the alien's] whereabouts and assessed each individual's risk of flight" (*id.* at 2), contacted the alien before deportation hearings to ensure his appearance (*id.* at 14), and accompanied the alien to his hearings (*ibid.*). If program administrators feared that the alien might abscond, he was returned to

2. Respondent asserts that Congress was "irrational and arbitrary" (Br. 40) when it designated the particular crimes that trigger mandatory detention during removal proceedings. He notes (Br. 2-3, 28-29) that Section 1226(c) sometimes can be triggered by convictions for theft crimes that States may label as misdemeanors. Respondent, however, fails to mention that such theft offenses are "aggravated felonies" that trigger Section 1226(c) only if they are offenses "for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G). Similarly, a criminal alien who is deportable for having committed a crime involving moral turpitude is thereby subject to Section 1226(c) detention only if (1) the alien has multiple convictions (see 8 U.S.C. 1226(c)(1)(B), 1227(a)(2)(A)(ii)), or (2) "the alien has been sentence[d] to a term of imprisonment of at least 1 year" and, in addition, the offense was committed within a specified period of time (generally five years) after the alien's admission to the United States (see 8 U.S.C. 1226(c)(1)(C), 1227(a)(2)(A)(i)).

More generally, respondent repeats the court of appeals' mistake (Pet. App. 20a) of ignoring Congress's reasons for selecting the particular crimes that trigger Section 1226(c).

INS detention. *Id.* at 14-17. But despite the screening for admission to the program and the intensive supervision of aliens in the program, approximately ten percent of program participants still failed to appear for their deportation proceedings. *Id.* at 3.

Amici (ABA Br. 24-25; Alienikoff, et al. Br. 17) cite, as another alternative to detention under Section 1226(c), the Institutional Removal Program (IRP). The IRP is a cooperative program of the INS, the Executive Office for Immigration Review, and federal and state corrections agencies, under which criminal aliens are placed in removal proceedings while incarcerated. Congress already has mandated use of that program "to the extent possible" in the case of aggravated felons like respondent. 8 U.S.C. 1228(a)(3). Factors that may render use of the IRP impossible include the pendency of an appeal that renders the alien's criminal conviction nonfinal, a corrections agency's failure to report that an alien is in custody, or a State's decision not to participate fully in the IRP.

When it drafted and relied on the definition of "aggravated felony" in 8 U.S.C. 1101(a)(43), Congress was not concerned solely with identifying crimes that are facially "indicative of [physical] danger" (Resp. Br. 29). Congress additionally sought to ensure removal of aliens whose crimes—such as counterfeiting, fraud, racketeering, and narcotics offenses—commonly contribute to the extremely serious problems of international terrorism, drug trafficking, and organized alien-smuggling. See Gov't Br. 34-35. Thus, respondent is incorrect when he assumes (Br. 28-29) that the importance of assuring removal of a criminal alien depends on only the length of the prison term that the alien received for a particular conviction.

Respondent similarly ignores (Br. 33, 39) the explanation for why Congress allowed criminal aliens who are subject to mandatory detention during their removal hearings nevertheless to be released in the Attorney General's discretion if, after the entry of a final removal order, they cannot be removed within 90 days: The post-removal-order provision addresses the possibility of an indefinite delay in removal that is beyond the government's control, which has no analog when an alien is detained during his administrative removal proceedings. See Gov't Br. 39 n.16. Section 1536 of Title 8, which respondent also cites as casting doubt on the rationality of mandatory detention (see Resp. Br. 39-[illegible]ncorrectly citing 8 U.S.C. 506, rather than 8 U.S.C. 1536), 47), likewise reflects no inconsistency on Congress's part. Section 1536 authorizes discretionary release of permanent resident aliens who are charged with being deportable as terrorists, when the removal proceeding arises from classified information and is conducted before a specially convened Article III court. See 8 U.S.C. 1531(1), 1532, 1533, 1536. Both the substance and the procedure of the removal proceedings to which Section 1536 applies are different than in proceedings covered by Section 1226(c). Unlike Section 1226(c), Section

1536 does not apply when the government can establish removability through straightforward proof, in administrative proceedings, of the fact of a criminal conviction.

Respondent's attack on Congress's legislative judgment is not advanced by his observation (Br. 25-26 & n.18) that, in the past, Executive Branch witnesses urged Congress to vest the INS with greater discretion whether to release certain criminal aliens. As previously explained (see Gov't Br. 36-37), the INS took the position during Congress's consideration of IIRIRA that it should retain discretionary authority to release many criminal aliens who, under Section 1226(c), now must be detained. That policy disagreement about administrative discretion and the best allocation of INS enforcement resources was (and is) for the political Branches, not the courts, to resolve. See *Flores*, 507 U.S. at 315 ("It may well be that other [detention] policies would be even better, but we are not a legislature charged with formulating public policy.") (brackets and internal quotation marks omitted).

D. SECTION 1226(c) DOES NOT AUTHORIZE "INDEFINITE" DETENTION

Unlike the post-removal-period detention provision at issue in *Zadvydas*, Section 1226(c) does not present any serious possibility of "indefinite, perhaps permanent, detention" (533 U.S. at 699). See Gov't Br. 38-40. In *Zadvydas*, the Court deemed it "important[]" that "post-removal-period detention, *unlike detention pending a determination of removability* * * *, has no obvious termination point." 533 U.S. at 697 (emphasis added).

Respondent does not dispute that the duration of Section 1226(c) detention is, on average, very short. See Gov't Br. 26-27. Accordingly, respondent's contention that removal proceedings sometimes last more than a few weeks (see Br. 26-27) cannot support his facial challenge to Section 1226(c). See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (party

bringing facial challenge "must establish that no set of circumstances exists under which the Act would be valid"); Gov't Br. 48-49.

Respondent maintains that the average length of detention is "skewed downward by the substantial percentage of Section 1226(c) detainees who do not challenge their removal." Resp. Br. 27. That argument also does not advance respondent's case, because it does not suggest that criminal aliens are held for the very long periods of time that concerned the Court in *Zadvydas*. Moreover, absent mandatory detention, criminal aliens who lack any genuine basis for challenging their removal and now do not do so, would be induced to contest removal in the hope of obtaining release from custody and the chance to flee. In any event, if there are exceptional cases in which the duration of detention would present special due process concerns, such cases would appropriately be addressed on their own facts. See Gov't Br. 48-49.[6]

---

[6] In this case, respondent was served with the INS's charge of being removable and received an administrative custody determination on February 2, 1999, the same day that he was taken into custody. See C.A. E.R. 3-5. Respondent filed his habeas corpus petition approximately three months later. Pet. App. 2a. As this case illustrates, an alien's own requests for postponement of removal proceedings may prolong Section 1226(c) detention. See Resp. Br. 9 n.12; Gov't Br. 5. But new expedition policies have greatly reduced such delays (see Gov't Br. 5 n.4), and postponements requested by the alien are not attributable to the government in any event. The duration of detention also may be affected by other choices made by the alien, such as what claims the alien makes (see Resp. Br. 32) and whether the alien is represented by counsel who are available pursuant to 8 U.S.C. 1362 and 8 U.S.C. 1228(a)(2) (see *1992 GAO Report* 51 (unrepresented aliens in INS custody for average of 38 days, represented aliens in custody for average of 95 days)). "[T]he legal system[] is replete with situations requiring the making of difficult judgments as to which course to follow," and, even in criminal cases, there is no constitutional prohibition against requiring litigants to make those choices. *McGautha* v. *California*, 402 U.S. 183, 213 (1971) (internal quotation marks omitted); accord *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30-31 (1973).

Respondent also states that Section 1226(c) detention generally lasts "between six months and well over a year" if the alien appeals his removal order to the BIA. Br. 4-5; see *id.* at 27. It is undisputed, however, that only about 15% of removal orders entered by IJs against criminal aliens are appealed. See Gov't Br. 40. For the remaining 85% of cases, removal proceedings generally are completed in much less than six months (47 days on average). See *id.* at 39-40. Furthermore, a criminal alien who has had a removal order entered against him by an IJ is especially poorly positioned to contend that his detention violates due process. IIRIRA limited the possible grounds for aggravated felons and other criminal aliens to challenge their removal. See *id.* at 27-30. The Executive Office for Immigration Review has determined that, when aliens charged as being criminals did appeal their removal orders, in Fiscal Year 2002 the BIA sustained their appeals less than two percent of the time. Thus, an IJ's entry of a removal order against a criminal alien almost certainly indicates that there will be a final order of removal. See *id.* at 46-47. As the Seventh Circuit has observed, an alien who cannot show a significant likelihood of successfully challenging removal has particularly poor grounds for contesting his detention during the removal proceedings. See *Parra* v. *Perryman*, 172 F.3d 954, 957-958 (7th Cir. 1999).

E. POSSIBLE CHALLENGES TO REMOVAL DO NOT RENDER SECTION 1226(c) UNCONSTITUTIONAL

Respondent intends to argue in his removal proceeding that his crimes do not make him removable from the United States. See Resp. Br. 11-12. For purposes of his habeas corpus challenge to Section 1226(c), however, respondent has conceded that he must be held in mandatory detention because he is subject to removal as an aggravated felon. See J.A. 9 ("Under the mandatory detention provisions, a bail hearing cannot be granted [respondent]."); Br. in Opp. 1-2

(same). Furthermore, although respondent invokes the Ninth Circuit's recent decision in *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (2002) (en banc), to dispute his aggravated-felon status, respondent's 1996 burglary conviction and 1997 theft conviction are crimes involving moral turpitude that independently render respondent removable (see Gov't Br. 3 n.2) and require his detention under Section 1226(c).[7]

Respondent also echoes (Br. 29-33) the court of appeals' arguments about the possibility of being granted relief from removal. See Pet. App. 13a-15a. Those arguments are addressed in the government's opening brief (at 24-31), and respondent raises only a few new points. Respondent does not dispute that aggravated felons are ineligible for the principal forms of discretionary relief under IIRIRA—asylum and cancellation of removal. See 8 U.S.C. 1158(b), 1229b. He argues (Br. 29 n.25) that discretionary relief from removal may be available under 8 U.S.C. 1182(c) (1994) (repealed), as construed in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), to some permanent resident aliens who (despite the requirement of 8 U.S.C. 1226(c)(1)) were not timely taken into INS custody. But the possibility that the Attorney General could award relief from removal to such an alien in the exercise of his discretion is not relevant to the alien's detention during removal proceedings, because the alien has no entitlement to discretionary relief. See Gov't Br. 27. Respondent, moreover, admits (Br. 29 n.25) that he has only an "argument" that the rationale of *St. Cyr* should be extended to cover his

---

[7] See 8 U.S.C. 1226(c)(1)(B), 1227(a)(2)(A)(ii). See also *De La Cruz* v. *INS*, 951 F.2d 226, 228 (9th Cir. 1991) (per curiam) (burglary a crime of moral turpitude); *United States* v. *Esparza-Ponce*, 193 F.3d 1133, 1136 (9th Cir. 1999) ("[E]very * * * circuit that has addressed the question in the context of the immigration laws has concluded that petty theft is a crime involving moral turpitude for purposes of those laws."), cert. denied, 531 U.S. 842 (2000).

case. Respondent is not within the class of aliens who are eligible to apply for discretionary relief under *St. Cyr* itself.

Respondent suggests (Br. 30 n. 26) that aliens who apply for withholding of removal obtain that relief as much as 20% of the time. Respondent arrives at his figure by comparing the number of cases in which IJs *deny* an application for asylum, with the number in which IJs *grant* withholding of removal, on the premise that withholding applications would not be adjudicated unless asylum is first denied.[8] The more straightforward and relevant figure, however, is the percentage of filed withholding applications that are granted by an IJ, which is approximately seven percent. Gov't Br. 30.

F. RESPONDENT'S ALTERNATIVE READING OF SECTION 1226(c) IS NOT PLAUSIBLE

Invoking the doctrine of constitutional avoidance, respondent argues (Br. 40-50) that the Court should construe Section 1226(c) to authorize detention of only those aliens who are subject to a final administrative order of removal. The courts of appeals have rejected that argument, finding respondent's proposed construction plainly incorrect. See Pet. App. 27a-29a; *Hoang* v. *Comfort*, 282 F.3d 1247, 1260-1261 (10th Cir. 2002), petition for cert. pending, No. 01-1616 (filed May 3, 2002); see also *Welch* v. *Ashcroft*, 293 F.3d 213, 220 n.7 (4th Cir. 2002) (suggesting *different* alternative construction).

Section 1231(a) of Title 8, which this Court interpreted in *Zadvydas*, governs detention of aliens after the entry of a

[8] In most cases, the scenario respondent posits would not occur because an alien who fails to establish asylum eligibility could not satisfy the stricter test for withholding of removal. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 423-424 (1987). Moreover, respondent excludes from his calculations cases in which the application for withholding of removal is not granted, if asylum is granted or asylum is not pursued because of the statutory bar rendering certain criminal aliens ineligible for asylum despite their eligibility for withholding of removal (see 8 U.S.C. 1158(b)(2), 1231(b)(3)(B)).

final order of removal. Whereas Section 1226 is entitled "Apprehension and detention of aliens" (8 U.S.C. 1226), Section 1231(a) is entitled "Detention, release, and removal of aliens *ordered removed*" (8 U.S.C. 1231(a) (emphasis added)). As *Zadvydas* explains, Section 1226 provides that "*[w]hile removal proceedings are in progress*, most aliens may be released on bond or paroled." 533 U.S. at 683 (citing 8 U.S.C. 1226(a)(2)) (emphasis added). "After entry of a final removal order and during the 90-day removal period, however, aliens must be held in custody" under Section 1231(a)(2). 533 U.S. at 683. "Subsequently," under Section 1231(a)(6), "the Government 'may' continue to detain an alien who still remains here or release that alien under supervision." *Ibid.*

If both the mandatory detention requirement of Section 1226(c) and the discretionary rule of Section 1231(a)(6) applied to aliens subject to a final order of removal, then detention of those aliens would be governed by conflicting statutory provisions. Furthermore, plain statutory language shows that Section 1226(c) applies to aliens who are taken into INS custody for the purpose of removal proceedings. The mandatory detention requirement of Section 1226(c) is an "[e]xcept[ion]" to Section 1226(a), which authorizes discretionary release "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a). Section 1226(c)(1) specifies that its detention requirement becomes applicable to an alien "when the alien is released" from criminal custody "on parole, supervised release, or probation" (8 U.S.C. 1226(c)(1))—not when a final order of removal is entered. The statutory exception to mandatory detention under Section 1226(c)(1), moreover, requires the Attorney General to determine whether an alien seeking release for witness-protection purposes "is likely to appear for any scheduled proceeding," thus confirming that Section 1226(c) applies while removal proceedings are pending. 8 U.S.C. 1226(c)(2).

Respondent asserts (Br. 45) that Section 1231(a) does not authorize detention of aliens who have obtained a judicial stay of their administrative removal order pending court review, and that Section 1226 simply "covers [this] gap." Nothing in the language of Section 1226 indicates that it was intended to cover such cases. Nor can respondent find any legislative history expressing the intent he attributes to Congress. See *id.* at 46-48; see also *id.* at 46 n.46 (noting government's position that Section 1231(a)(1)(C), not Section 1226, applies to aliens with judicially stayed removal orders). Regardless, however, respondent's "gap-filling" argument suggests at most that an alien who has obtained a judicial stay of his removal order should be treated, for detention purposes, as if there were no removal order. The application of Section 1226 to such aliens would not affect its obvious application to respondent, whose removal proceedings are pending.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2002

(5)

Supreme Court, U.S.
FILED
AUG 28 2002
OFFICE OF THE CLERK

Nos. 01-1491

IN THE
Supreme Court of the United States

CHARLES DEMORE, District Director,
Immigration and Naturalization Service, *et al.*
Petitioners,

v.

HYUNG JOON KIM,
Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION; ALLIED EDUCATIONAL FOUNDATION; U.S. REPS. BOB BARR, JOE BARTON, JOHN DOOLITTLE, WALTER JONES, AND LAMAR SMITH; AND U.S. SENATOR JESSE HELMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: August 28, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0093 – WASHINGTON, D. C. 20001

31 pp

QUESTIONS PRESENTED

Whether Respondent's mandatory detention under 8 U.S.C. § 1226(c) violates the Due Process Clause of the Fifth Amendment, where Respondent was convicted of an aggravated felony after his admission into the United States?

The case also raises the following antecedent question:

Whether a federal district court possesses jurisdiction under 28 U.S.C. § 2241 to set aside the action of the Attorney General in detaining a removable alien who was convicted of an aggravated felony after his admission into the United States, despite 8 U.S.C. § 1226(e)'s admonition that "[n]o court may set aside any action or decision by the Attorney General" to detain an alien under § 1226?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. 8 U.S.C. § 1226(e) DEPRIVES FEDERAL COURTS OF JURISDICTION TO GRANT HABEAS CORPUS RELIEF TO ALIENS CHALLENGING THEIR § 1226(c) DETENTION 6

A. Interpreting § 1226(e) as Repealing Habeas Jurisdiction in This Case Is Consistent with *St. Cyr* 8

B. Appeals Court Decisions to the Contrary Either Ignore § 1226(e) or Misinterpret Its Language 12

II. CONGRESS'S DECISION TO BAR REVIEW OF § 1226(c) DETENTIONS DOES NOT VIOLATE THE SUSPENSION CLAUSE 14

Page

A. Neither in 1789 Nor Thereafter Would Common Law Courts Have Recognized Mr. Kim's Right to Contest Detention Pending Deportation, by Seeking a Writ of Habeas Corpus 15

B. § 1226(e) Can and Should Be Interpreted as Permitting Court Challenges by Those Claiming Not to Be Aliens or Not to Have Committed Aggravated Felonies 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases:

Bridges v. Wixon,
326 U.S. 135 (1945) 21
Carlson v. Landon,
342 U.S. 524 (1952) 11, 20, 21
Chin Yow v. United States,
208 U.S. 8 (1908) 22, 23
Doherty v. Thornburgh,
943 F.2d 204 (2d Cir. 1991) 16
Ekiu v. United States,
142 U.S. 651 (1891) 16
Felker v. Turpin,
518 U.S. 651 (1996) 15
Fong Yue Ting v. United States,
149 U.S. 698 (1893) 17, 18
Heikkila v. Barber,
345 U.S. 229 (1953) 9, 10, 14, 21
INS v. St. Cyr,
121 S. Ct. 2771 (2001) . . . . . *passim*
The Japanese Immigrant Case,
189 U.S. 86 (1904) 19
Kwock Jan Fat v. White,
253 U.S. 454 (1920) 22, 23
Ng Fung Ho v. White,
259 U.S. 276 (1922) 22, 23
Parra v. Perryman,
172 F.3d 954 (7th Cir. 1999) 12, 16
Patel v. Zemski,
275 F.3d 299 (3d Cir. 2001) 12, 13

Page

Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999) 13
Reno v. Flores, 507 U.S. 292 (1993) 11, 20
Richardson v. Reno, 180 F.3d 1311 (11th Cir. 1999), *cert. denied*, 529 U.S. 1036 (2000) 16
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 7
Wing Wong v. United States, 163 U.S. 228 (1896) 20
Zadvydas v. Davis, 533 U.S. 678 (2001) 24
Zakonaite v. Wolf, 226 U.S. 272 (1912) 19

Statutes and Constitutional Provisions:

U.S. Const., art. i, § 9, cl. 2, Suspension Clause 14

Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA") . . 9, 10, 14, 15

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 . . . . . *passim*

8 U.S.C. § 1101(a)(43)(G) 3, 8
8 U.S.C. § 1226 . . . . . 5, 8, 10, 13

Page

8 U.S.C. § 1226(c) . . . . . *passim*
8 U.S.C. § 1226(e) . . . . . *passim*
8 U.S.C. § 1227(a)(2)(A)(iii) 3
8 U.S.C. § 1229b(a)(3) 24
8 U.S.C. § 1231(b)(3) 24
8 U.S.C. § 1252(a)(1) 9
8 U.S.C. § 1252(a)(2)(C) 9
8 U.S.C. § 1252(b)(9) 9
8 U.S.C. § 1252(g) 13

28 U.S.C. § 2241 . . . . . 7, 11, 14, 15

Miscellaneous:

Senate Judic. Comm., "The Immigration and Naturalization Systems of the United States," S. Rep. No. 1515, 81st Cong., 2d Sess. 28 (1950) 22

SUP. CT. R. 14.1(a) 6

BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. REPS. BOB BARR, JOE BARTON, JOHN DOOLITTLE, WALTER JONES, AND AND LAMAR SMITH; U.S. SENATOR JESSE HELMS; AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that aliens who engage in terrorism or other criminal activity are not permitted to pursue their criminal goals while in this country. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999); *Al Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001); *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988). WLF also filed a brief in support of the petition for certiorari in this case.

The Honorable Jesse Helms is a United States Senator from North Carolina. The Honorable Bob Barr, the Honorable Joe Barton, the Honorable John Doolittle, the Honorable Walter Jones, and the Honorable Lamar Smith, are United States Representatives from, respectively,

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

Georgia, Texas, California, North Carolina, and Texas. Rep. Smith was Chairman of the Immigration and Claims Subcommittee of the House Judiciary Committee at the time Congress adopted the legislation at issue in this case. All believe strongly that Congress and the Executive Branch ought to be permitted to protect American citizens by imposing finite periods of detention on those removable aliens who have been adjudged guilty of aggravated felonies. All are supporters of the mandatory detention provisions of 8 U.S.C. § 1226(c) and believe that it is fully consistent with the requirements of the U.S. Constitution.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Particularly in light of recent terrorist attacks in this country, *amici* believe that the political branches of government must be afforded broad power to detain aliens who are convicted of aggravated felonies. Where those aliens admit they are here illegally but nonetheless are fighting deportation based on efforts to win discretionary adjustment of status, *amici* believe that the Immigration and Naturalization Service ("INS") ought to detain such aliens during the time it takes to complete deportation proceedings.

Amici are concerned that the decision below, if allowed to stand, will result in an unwarranted abridgement of the power of the political branches of government to control immigration into this county, a power that historically has been subject to only extremely limited judicial review. The

decisions below discuss at great length the alleged rights of aliens who are convicted felons, but do not seem to have taken into account the rights of the federal government to enforce its immigration laws or the rights of those who may be threatened by Mr. Kim's continued presence in American society.

Amici are filing this brief with the consent of all parties. Letters of consent have been lodged with the clerk.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate by reference the Statement contained in the Brief for Petitioners.

In brief, Hyung Joon Kim is 24-year-old citizen of Korea who has been a permanent resident alien living in California since 1986. The Immigration and Naturalization Service (INS) has been seeking his removal from the country because of his repeated criminal offenses.

Mr. Kim's *adult* criminal record dates to July 1996, when he was convicted at age 18 of first degree burglary in California state court. Pet. App. 2a. In August 1997, he was convicted in California state court of "petty theft with priors," and was sentenced to three years imprisonment. *Id.* After serving 18 months of that sentence, he was release to the custody of the INS on February 2, 1999. *Id.* The INS in 1998 had charged him with being a deportable alien under 8 U.S.C. § 1227(a)(2)(A)(iii) because he had been convicted of an "aggravated felony" within the meaning of 8 U.S.C. § 8 U.S.C. § 1101(a)(43)(G). Mr. Kim's removal hearing before an Immigration Judge was scheduled for March 2002 but has been delayed at his request.

One year prior to Mr. Kim's aggravated felony conviction, Congress adopted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, which *inter alia* added a new § 236(c) to the Immigration and Nationality Act, 8 U.S.C. § 1226(c). Section 1226(c) *requires* the INS (with one exception not relevant here) to take into custody, pending removal, any alien deportable by reason of having been convicted of an aggravated felony. Section 1226(c) is merely the latest federal mandatory detention statute; a series of federal statutes dating back to 1988 required detention pending deportation of various categories of alien criminals. *See* Pet. App. 35a-36a.

After bringing charges against Mr. Kim, the INS determined that § 1226(c) precluded his release on bond. *Id.* 33a. On May 17, 1999, Mr. Kim filed a habeas corpus petition in U.S. District Court for the Northern District of California, seeking release from detention. On August 11, 1999, the district court granted the petition. *Id.* at 31a-51a. The court held that § 1226(c) was facially invalid as a violation of both substantive and procedural due process because: (1) the Constitution prohibits the detention of aliens in the absence of evidence that they pose a risk of flight or a threat to the community; and (2) aliens are entitled to an "individualized bond hearing" to determine whether they pose a risk of flight or a threat to the community. The INS subsequently released Mr. Kim on $5,000 bond. *Id.* at 2a.

On January 9, 2002, the U.S. Court of Appeals for the Ninth Circuit affirmed. *Id.* at 1a-30a. The appeals court did not concur with the district court's holding that § 1226(c) was facially invalid, but it held that § 1226(c) is unconstitutional as applied to Mr. Kim and similarly situated permanent

resident aliens. *Id.* at 6a. The court held that Mr. Kim had "an obvious and important" due process interest in liberty "during the pendency of removal proceedings." *Id.* at 8a. The court held that that liberty interest outweighed the INS's justifications for seeking to detain him -- including preventing him from fleeing and protecting public safety -- in the absence of "an individualized determination" that he posed a risk of flight or a risk to public safety. *Id.* at 12a-21a, 30a.

SUMMARY OF ARGUMENT

Congress has unambiguously decreed that the federal courts are not to "set aside any action or decision" of the INS taken pursuant to 8 U.S.C. § 1226 "regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e). It is undisputed that the INS acted pursuant to 8 U.S.C. § 1226 in determining that Mr. Kim should be detained pending removal. Accordingly, the Court should reverse the judgment below on the grounds that the lower courts did not possess jurisdiction to overturn the INS's decision to detain Mr. Kim.

Nothing in *INS v. St. Cyr*, 121 S. Ct. 2271 (2001), is to the contrary. The factors that led the Court in *St. Cyr* to conclude that other provisions of IIRIRA did not effect a repeal of habeas jurisdiction are not present in this case. *St. Cyr* held that Congress will not be deemed to have intended to repeal habeas jurisdiction in the absence of a specific and unambiguous statutory directive to that effect; S 1226(e)'s language easily meets that standard. Appeals courts that have reached a contrary interpretation of § 1226(e) have failed to address its plain statutory language.

Nor should § 1226(e) as interpreted herein be deemed a violation of the Suspension Clause of the Constitution, Article I, § 9, cl. 2. The evidence indicates that the courts in this country and England would not in 1789 have entertained a habeas action of the type asserted by Mr. Kim, nor would they have done so until very recently. Under those circumstances, it is well within Congress's power to withdraw jurisdiction over all claims that an alien is being wrongfully detained pending deportation.

ARGUMENT

I. 8 U.S.C. § 1226(e) DEPRIVES FEDERAL COURTS OF JURISDICTION TO GRANT HABEAS CORPUS RELIEF TO ALIENS CHALLENGING THEIR § 1226(c) DETENTION

Congress has acted unequivocally to bar federal courts from overturning Executive Branch decisions to detain alien felons during the time required to effect their deportation. Accordingly, the Court should reverse the judgment below and direct that the habeas corpus petition be dismissed, without reaching the merits of Respondent's due process claims.

In its certiorari petition, the INS did not raise this jurisdictional issue, and *amici* do not know whether it plans to do so in its merits brief. That omission nonetheless should not deter the Court from addressing the issue. It is always appropriate, of course, for a court *sua sponte* to raise the issue of its own jurisdiction, and the jurisdictional issue is a "subsidiary question fairly included" within the question presented by Petitioner. SUP. CT. R. 14.1(a).

The case is, perhaps, more easily resolved by overlooking the jurisdictional issue and addressing the merits of Respondent's due process claims. In *amici*'s view, the INS is likely to prevail on its argument that it has afforded Respondent all the process he is due, while the jurisdictional issue presents a much closer question. The Court nonetheless should not address the merits without first determining whether it possesses jurisdiction to do so. "The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94 (1998) (citations omitted). Accordingly, a federal court may not exercise "hypothetical jurisdiction" over a case as a means of disposing of a case without the need to address a difficult jurisdictional issue; "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment -- which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Id.* 101.

The district court and Ninth Circuit asserted jurisdiction over this case under the federal habeas statute, 28 U.S.C. § 2241. However, 8 U.S.C. § 1226(e) clearly suggests that no such jurisdiction exists in the lower federal courts:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside *any action or decision* by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole. (Emphasis added.)

There is no question that following Mr. Kim's release from state prison in February 1999, the INS detained him

"under this section," *i.e.*, under 8 U.S.C. § 1226. Moreover, the action of which Mr. Kim complains is one "regarding the detention or release of an[] alien or the grant, revocation, or denial of bond or parole." Accordingly, the only plausible reading of § 1226(e) is that Congress intended to prohibit federal courts from "set[ting] aside" the INS's detention of Mr. Kim and other similarly situated criminal aliens.

Amici recognize that there is "a strong presumption in favor of judicial review of administrative action," and that the Court has a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr*, 121 S. Ct. 2271, 2278 (2001). Nonetheless, there is no plausible interpretation of § 1226(e) other than that Congress intended to preclude *all* lower-court review of an INS decision to detain an alien felon pursuant to § 1226, including habeas review.[2] The Court should reverse the appeals court's judgment and remand with directions that the petition be denied for want of jurisdiction.

A. Interpreting § 1226(e) as Repealing Habeas Jurisdiction in This Case Is Consistent with *St. Cyr*

The Court's decision last year in *St. Cyr* required it to address other provisions of IIRIRA that arguably barred federal court review of habeas corpus petitions filed by alien

[2] Section 1226(e) could plausibly be read as not barring claims that the detainee is not actually an alien or has not actually been convicted of an aggravated felony. Detention in such circumstances arguably is not detention "under this section," thereby rendering the statutory bar inapplicable. However, Mr. Kim does not contest that he is an alien or that the crimes of which he stands convicted are "aggravated felonies" within the meaning of 8 U.S.C. § 1101(a)(43).

felons complaining that the INS improperly failed to consider their requests for waiver of deportation.[3] The Court declined to interpret those provisions as a bar to the habeas claims, finding that the IIRIRA provisions relied on by the INS failed to overcome the "strong presumption" in favor of the availability of habeas jurisdiction. *St. Cyr*, 121 S. Ct. at 2278. The Court held that if Congress wishes to repeal habeas jurisdiction, it "must articulate specific and unambiguous statutory directives to effect a repeal." *Id.* at 2278-79.

The factors that led the Court in *St. Cyr* to conclude that Congress had there not intended to limit habeas jurisdiction are not present in this case. Crucial to the Court's conclusion was use of the term "judicial review" in each of the three jurisdiction-limiting IIRIRA provisions at issue in that case.[4] The Court explained:

> The term "judicial review" or "jurisdiction to review" is the focus of each of these three provisions. In the immigration context, "judicial review" and "habeas corpus" have historically distinct meanings. See *Heikkila v. Barber*, 345 U.S. 229 (1953). In *Heikkila*, the Court concluded that the finality provisions at issue "preclud[ed] judicial review" to the maximum extent possible under the Constitution, and thus concluded that the APA was inapplicable. *Id.* at 235. Nevertheless,

[3] 8 U.S.C. §§ 1252(a)(1), (a)(2)(C), and (b)(9).

[4] Also at issue in *St. Cyr* was a provision of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, that, the INS argued, similarly demonstrated Congress's intent to repeal federal habeas jurisdiction over the alien felons' claims. *Id.* at 2284-85.

> the Court reaffirmed the right of habeas corpus. *Ibid.* Noting that the limited role played by the courts in habeas corpus proceedings was far narrower than the judicial review authorized by the APA, the Court concluded that "it is the scope of inquiry on habeas corpus that differentiates" habeas review from "judicial review." *Id.* at 236.

St. Cyr, 121 S. Ct. at 2285.

St. Cyr is inapposite in this respect because the crucial language of § 1226(e) makes no mention of limitations on "judicial review." Although the first sentence of § 1226(e) bars "review" of the Attorney General's "discretionary judgments" to detain aliens pursuant to § 1226,[5] the second sentence is not so limited. The second sentence states unequivocally that "[n]o court may set aside any action or decision" to detain an alien under § 1226. There can be no argument that the second sentence employs a term of art such that "[n]o court" does not really mean "no court," or that INS decisions may not be "set aside" in actions filed under the Immigration and Naturalization Act but may be set aside in habeas actions.

Another factor in *St. Cyr*'s determination that Congress had not intended to bar habeas review was the absence of any language in the relevant IIRIRA and AEDPA provisions making explicit reference to habeas review under 28 U.S.C.

---

[5] The first sentence of § 1226(e) presumably applies primarily to actions taken by the Attorney General pursuant to §§ 1226(a) and (b). Those subsections grant the Attorney General discretionary authority to arrest, detain, release, and/or rearrest aliens who are subject to removal proceedings but who are not subject to mandatory detention under § 1226(c).

§ 2241. The Court concluded, "Given the historic use of § 2241 jurisdiction as a means of reviewing deportation and exclusion orders, Congress' failure to refer to § 2241 is particularly significant." *Id.* at 2286 n.36.

That factor is of limited relevance in this case because there is no similar history of routine reliance on habeas jurisdiction to challenge detention of aliens pending completion of deportation/removal proceedings. *Amici* are aware of only two cases in which the Court has heard such a challenge, and neither was successful. *Reno v. Flores,* 507 U.S. 292 (1993); *Carlson v. Landon,* 342 U.S. 524 (1952). Moreover, *Reno v. Flores* was a class action suit (filed on behalf of a class of juvenile aliens) in which § 2241 was merely one of several statutes invoked as the basis for federal court jurisdiction.[6] In the absence of a pre-1996 history of routine reliance on § 2241 to challenge detention of aliens pending completion of deportation proceedings, no significance can be attached to Congress's failure to cite § 2241 when (in § 1226(e)) it mandated that "no court" may set aside any actions taken by the Attorney General under § 1226. *St. Cyr* held that Congress will not be deemed to have intended to repeal habeas jurisdiction in the absence of a "specific and unambiguous statutory directive" to that effect; § 1226(e)'s "no court" language easily meets that standard.

---

[6] The plaintiffs in that suit did not limit themselves to the narrow claims that are the hallmark of habeas review, *St. Cyr,* 121 S. Ct. at 2285, but rather brought a wide-ranging facial challenge to the procedures employed by the INS in determining whether to detain juvenile aliens, as well as to the conditions of their detention. *Reno v. Flores,* 507 U.S. at 296.

In sum, nothing in *St. Cyr* suggests that § 1226(e) should be interpreted to mean anything other than what its unambiguous language states: "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention . . . of any alien."

B. Appeals Court Decisions to the Contrary Either Ignore § 1226(e) or Misinterpret Its Language

Each of the appeals courts to consider the issue has held that § 1226(e) is *not* a bar to habeas corpus claims such as Mr. Kim's. *See, e.g., Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999); *Patel v. Zemski*, 275 F.3d 299, 302 (3d Cir. 2001). However, the courts' analyses of the issue all have been cursory and have failed to address § 1226(e)'s plain statutory language.

The Seventh Circuit evaded the jurisdictional bar in *Parra* by claiming that § 1226(e) prohibits only "[t]wo particular avenues of attack" on detention decisions: (1) an argument that the Attorney General erred in applying § 1226 to an alien; and (2) an argument that he erred in deeming the alien statutorily ineligible for bail. *Parra*, 172 F.3d at 957. The court held that "[a] person who has different legal arguments may present them," including an argument that detention is improper because § 1226(c) is unconstitutional. *Id.* That interpretation of § 1226(e) is not plausible. The second sentence of § 1226(e) does not state that certain types of detention decisions or certain types of legal challenges to detention are barred; rather, it states categorically that "[n]o court may set aside" INS detention of an alien felon pursuant to § 1226.

The Seventh Circuit attempted to draw support from this Court's interpretation of another jurisdiction-limiting immigration statute in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999). The comparison was not well-taken. The statute at issue in *American-Arab*, 8 U.S.C. § 1252(g), sharply limits judicial review of claims by an alien "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against an alien under this Act." The Court concluded that § 1252(g) imposed limits on judicial review *only* when the plaintiffs' claims addressed one of the three types of "decision[s] or action[s]" enumerated in § 1252(g); but the Court made clear that § 1252(g) applied *regardless* of the grounds raised by the alien to challenge the Attorney General's decisions or actions in these three areas. *American-Arab*, 525 U.S. at 482-83. Similarly, 8 U.S.C. § 1226(e) prohibits a court from "set[ting] aside" a decision by the Attorney General to detain an alien felon pursuant to § 1226, *regardless* of the basis for challenging detention. Accordingly, contrary to the Seventh Circuit's contention, the Court's analysis in *American-Arab* fully supports *amici*'s contention that § 1226(e) bars Mr. Kim's habeas claim.

The Third Circuit in *Patel* likewise held that § 1226(e) does not bar judicial review of a habeas corpus challenge to INS detention of an alien felon under § 1226. But it did so without any real analysis; it simply cited to *Parra* and stated in conclusory fashion: "[§ 1226(e)], which restricts judicial review of INS decisions made under this section [1226], does not restrict judicial review of its constitutionality." *Patel*, 275 F.3d at 302. To the contrary, § 1226(e) plainly *does* restrict judicial review of a challenge to § 1226(c) detention based on a claim that § 1226(c) is unconstitutional; § 1226(e)

states that "no court" may set aside a § 1226 detention actions, without limitation based on the grounds for challenge.

Other courts, including the court below, have upheld jurisdiction without any reference whatsoever to § 1226(e). *See* Pet. App. 2a-3a ("The district court had jurisdiction pursuant to 28 U.S.C. § 2241. *See INS v. St. Cyr*, 533 U.S. 289 (2001)."). As explained above, *St. Cyr* does not require a conclusion that the Court ignore § 1226(e)'s clear prohibition against federal court interference with an action by the Attorney General to detain an alien felon temporarily while removal proceedings are ongoing.

II. CONGRESS'S DECISION TO BAR REVIEW OF § 1226(c) DETENTIONS DOES NOT VIOLATE THE SUSPENSION CLAUSE

St. Cyr stated that the IIRIRA and AEDPA provisions at issue in that case, if interpreted as barring habeas jurisdiction in any federal court:

> [W]ould give rise to substantial constitutional questions. Article I, § 9, cl. 2 of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Pubic Safety may require it." Because of that Clause, some "judicial intervention in deportation cases" is unquestionably "required by the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 235 (1953).

St. Cyr, 121 S. Ct. at 2279. The Court avoided those "substantial constitutional questions" by invoking the doctrine of constitutional doubt and interpreting the relevant IIRIRA

and AEDPA provisions as not repealing the federal court's § 2241 habeas jurisdiction. *Id.* at 2287.

St. Cyr undoubtedly raises questions regarding the constitutionality of § 1226(e). Because § 1226(e) repeals federal habeas jurisdiction over Mr. Kim's claims that his mandatory detention pending removal is unconstitutional, one conceivably could argue that it violates the Suspension Clause.[7] *Amici* respectfully submit, however, that any such argument ultimately is unavailing.

A. Neither in 1789 Nor Thereafter Would Common Law Courts Have Recognized Mr. Kim's Right to Contest Detention Pending Deportation, by Seeking a Writ of Habeas Corpus

St. Cyr held that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *Id.* at 2279 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996). Accordingly, the constitutionality of § 1226(e)'s repeal of habeas jurisdiction over the claims of Mr. Kim and other similarly situated alien felons turns on whether the writ of habeas corpus was generally available to those in Mr. Kim's position in 1789 (or, possibly, thereafter). Because the historical evidence suggests that Mr. Kim would not have been permitted to contest his detention pending removal/deportation, there is no constitutional violation.

---

[7] Because § 1226(e) is not susceptible of any plausible interpretation that would avoid raising questions regarding its constitutionality, the doctrine of constitutional doubt has no application in this case.

It is no doubt true that "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *St. Cyr.*, 121 S. Ct. at 2280. But the INS's efforts to take Mr. Kim into custody do not constitute "detention" of the sort that historically has been subject to immediate habeas review. The INS has no desire to retain custody of removable aliens; its sole purpose in taking custody is to ensure a means of effecting removal. A removable alien remains in INS custody only so long as he continues to fight the INS's removal efforts. In that very real sense, a removable alien in INS custody possesses at all times the keys to his cell; he can unlock the door at any time by agreeing to return to his native land.[8]

Because Colonial America and the United States imposed few controls on immigration before 1875,[9] there is little early case law regarding the availability of habeas corpus review as a means of challenging detention pending deportation. The English experience, however, suggests that habeas review was not available:

---

[8] Numerous federal appeals courts have recognized this fundamental aspect of INS detention. *See. e.g., Parra,* 172 F.3d at 957 (detained alien "has the keys in his pocket"); *Doherty v. Thornburgh,* 943 F.2d 204, 212 (2d Cir. 1991) (detained alien "possessed, in effect, the key that unlocks his prison cell"); *Richardson v. Reno,* 180 F.3d 1311, 1317 (11th Cir. 1999) ("Richardson's detention is not entirely beyond his control; he is detained only because of the removal proceedings, and he may obtain his release any time he chooses by withdrawing his application for admission and leaving the United States"), *cert. denied,* 529 U.S. 1036 (2000).

[9] *St. Cyr,* 121 S. Ct. at 2282.

In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the King without the consent of Parliament. It was formerly exercised by the King, but in later times by Parliament, which passed several acts on the subject between 1793 and 1848. 2 Inst. 57; 1 Chalmers Opinions, 26; 1 Bl. Com. 260; Chitty on the Prerogative, 49; 1 Phillimore, c. 10, § 220 and note; 30 Prl. Hist. 157, 167, 188, 217, 229; 34 Hansard Parl. Deb. (1st series) 441, 445, 471, 1065-1071; 6 Law Quart. Rev. 27.

Eminent English judges, sitting in the Judicial Committee of the Privy Council, have gone very far in supporting the exclusion or expulsion, by the executive authority of a colony, of aliens having no absolute right to enter its territory or to remain therein.

Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893).

As laws limiting immigration became increasingly restrictive in the late 19th century, the number of lawsuits challenging decisions to deport or exclude aliens also increased. Because federal immigration laws from 1891 to 1952 made no express provision for judicial review of such decisions, what limited review that existed generally took the form of petitions for writs of habeas corpus. Early cases made clear that the Court, while recognizing federal court jurisdiction over such petitions, was unwilling to second-guess Executive Branch deportation and exclusion decisions. In rejecting a habeas petition filed by Chinese citizens who had lived in this country many years but who had been ordered deported because they could not obtain certificates demonstrating their residency, the Court explained that, to a

large extent, the courts had a role to play in exclusion and deportation cases only to the extent that they were assigned a role by Congress:

> In Nichimura Ekiu's case, it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency. 142 U.S. 660.
>
> The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.
>
> The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an aliens' right to be in the country has been made by Congress to depend.

Fong Yue Ting, 149 U.S. at 713-14.

Later cases slightly expanded the scope of habeas review of deportation orders. Thus, while Congress was free to establish virtually any rules for the expulsion of aliens and to specify that those rules were to be administered solely by

executive officers without an opportunity for judicial review, habeas relief was available if the proceedings were conducted in so unfair a manner as to constitute a deprivation of liberty without due process of law. *See, e.g., The Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1904) (proceedings are constitutionally deficient if alien is not afforded opportunity to present her case); *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912). In all such cases, the availability of habeas relief was predicated on the petitioner being subject to government detention. *See, e.g., Ekiu v. United States*, 142 U.S. 651, 660 (1891) ("An alien immigrant, prevented from landing by any such officer claiming to do so by an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.").

But while the Court was willing to entertain habeas challenges to a government exclusion/deportation decision, in no case did the Court question the right of immigration officials to detain the alien while exclusion/deportation proceedings were on-going. Indeed, it was apparent from the structure of the Court's analysis that the Court would have rejected any such claims. By allowing deportation issues to be decided solely by administrative proceedings without possibility of judicial review, the Court implicitly endorsed continued detention while those proceedings continued. Only after those administrative proceedings had been completed (and the alien could thus conceivable have a basis for challenging the proceedings as fundamentally unfair) would the Court permit aliens to file habeas corpus petitions.

The Court, in essence, imposed an exhaustion of administrative remedies requirement on the filing of habeas corpus challenges to temporary government detention

imposed in aid of deportation proceedings. Although such detention was a sufficient deprivation of liberty to trigger habeas jurisdiction, the right to bring a habeas action did not ripen until the alien had a basis for demonstrating that the attempted deportation was wrongful. The Court addressed the point explicitly in *Wing Wong v. United States,* 163 U.S. 228 (1896). The Court carefully distinguished between detention imposed on aliens for the purpose of punishment and temporary detention imposed to aid deportation. The Court strongly criticized government efforts to impose punishment on Chinese laborers (in the form of imprisonment for one year at hard labor) without affording them the procedural protections of a criminal trial before a judge. *Id.* at 236-38. At the same time, the Court endorsed Executive Branch detention as a necessary means of ensuring that deportation could be effected:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.

Id. at 235.

Indeed, *Wing Wong*'s endorsement of detention as a necessary component of the deportation process has carried forward to the present. *See Carlson v. Landon*, 342 U.S. at 538 ("[d]etention is necessarily a part of the deportation procedure."); *Reno v. Flores,* 507 U.S. at 306 ("Congress has the authority to detain aliens suspected of entering the

country illegally pending their deportation hearings."). *See also St. Cyr*, 121 S. Ct. at 2281 ("In this case, the INS points out, there is no dispute that the INS had authority in law to hold St. Cyr, as he is eligible for removal.").

By the middle of the 20th century, the percentage of aliens in deportation proceedings being released on parole pending deportation increased considerably. *See, e.g., Carlson v. Landon,* 342 U.S. at 538 n.31. Nonetheless, until 1952 habeas corpus petitions remained the only means by which deportation orders could be challenged. *Heikkila,* 345 U.S. at 236-37. Thus, an alien who had been paroled but who wished to challenge a final order of deportation had to surrender himself to the custody of the INS before filing a habeas petition challenging the order. *See, e.g., Bridges v. Wixon,* 326 U.S. 135, 140 (1945). Because being in INS custody was a pre-condition for filing a habeas petition challenging deportation, it is hardly surprising that the Court was not faced with numerous claims from aliens seeking release from detention pending deportation.

Moreover, it was generally understood by Congress in that era that such relief was unavailable. In a 1950 report, a report that ultimately led to adoption of the INA in 1952, the Senate Judiciary Committee made clear its belief that the only form of relief available to an alien in deportation proceedings was a habeas corpus petition, and that such petitions could be filed only after the final order of deportation had been issued:

> Once the order and warrant of deportation are issued, the administrative process is complete. Under the fifth amendment to the Constitution, the "due process" provision, the alien may, however, petition for a writ of habeas corpus. . . . Habeas

> corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service.

Senate Jud. Comm., "The Immigration and Naturalization Systems of the United States," S.Rep. No. 1515, 81st Cong., 2d Sess. 28, 629 (1950) (quoted in *Shaughnessy v. Pedreiro,* 349 U.S. 591, 596 (1955)).

Actions challenging detention pending deportation have become somewhat more common in the past 40 years. Congress sought to reverse that trend with respect to alien criminals when it adopted §§ 1226(c) and (e). Any claim that § 1226(e) is unconstitutional under the Suspension Clause is unavailing in the face of evidence that in 1789 and at all times until very recently, the law did not recognize the right of aliens being detained by immigration authorities to file a habeas corpus petition challenging detention pending deportation.

B. § 1226(e) Can and Should Be Interpreted as Permitting Court Challenges by Those Claiming Not to Be Aliens or Not to Have Committed Aggravated Felonies

The Court on several occasions has upheld the right to a judicial forum for those challenging deportation on the ground that they are United States citizens. *Ng Fung Ho v. White,* 259 U.S. 276 (1922); *Kwock Jan Fat v. White,* 253 U.S. 454, 465 (1920); *Chin Yow v. United States,* 208 U.S. 8, 12-13 (1908). Accordingly, someone in Mr. Kim's position cannot -- consistently with due process -- be denied an opportunity to file a habeas corpus petition challenging deportation on the grounds that he is a citizen. Although the

issue is less clear, due process also likely demands that such an individual be provided an opportunity to challenge in federal court the INS's contention that he has been convicted of an aggravated felony.

While requiring judicial review of the facts underlying a citizenship claim, the three cases all strongly support the position that habeas jurisdiction historically has not been available to challenge detention pending deportation. In each case, the Court made clear that while the petitioner had wrongly been denied a judicial hearing on his citizenship claim, immediate release from custody could not be ordered. Rather, detention could continue until such time as the petitioner's citizenship claim was proven. As the Court explained in *Chin Yow,* the alien "is imprisoned only to prevent his entry and an unconditional release would make the entry complete without the requisite proof." *Chin Yow,* 208 U.S. at 13. The other two cases explicitly adopted the procedures employed by *Chin Yow. Ng Fung Ho,* 259 U.S. at 285; *Kwock Jan Fat,* 253 U.S. at 465.

Amici nonetheless believe that it would be appropriate to interpret § 1226(e) as not barring claims that the detainee is not actually an alien or has not actually been convicted of an aggravated felony. Detention in such circumstances arguably is not detention "under this section," thereby rendering the statutory bar inapplicable. Moreover, the INS in other litigation has interpreted § 1226(e) in that manner, and its interpretation of the statute is entitled to deference.

But Mr. Kim is unaffected by any such interpretation. He does not deny that he is an alien. He does not deny that he has been convicted of an aggravated felony. Moreover, he lacks an even colorable claim that he is eligible for any

sort of relief from deportation. Because he has committed an aggravated felony, he is ineligible for cancellation of removal under 8 U.S.C. § 1229b. *See* 8 U.S.C. § 1229b(a)(3). Nor is he eligible for withholding of removal under 8 U.S.C. § 1231(b)(3) in the absence of any evidence that his "life or freedom" would be threatened because of his "race, religion, nationality, membership in a particular social group, or political opinion" if he were returned to Korea.

Finally, *amici* note that any constitutional concern regarding limitations on the duration of Mr. Kim's detention is misplaced. In light of *Zadvydas v. Davis,* 533 U.S. 678 (2001), Mr. Kim cannot be subjected to indefinite detention. But while this case has been pending far longer than the typical § 1226(c) matter, most of the delay is attributable to Mr. Kim himself, who has asked for repeated continuances of his pending hearing before an Immigration Judge.

CONCLUSION

Amici curiae respectfully request that the Court reverse the judgment below.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036

Date: August 28, 2002

Supreme Court, U.S.
FILED
OCT 28 2002
OFFICE OF THE CLERK

No. 01-1491

IN THE

Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, *et al.*,

Petitioners,

v.

HYUNG JOON KIM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENT

ALFRED P. CARLTON, JR.*
President, American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 588-5000

Of Counsel:
JEFFREY L. BLEICH
DEBORAH N. PEARLSTEIN

Attorneys for Amicus Curiae

* *Counsel of Record*

177056

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the mandatory detention of lawful permanent residents under 8 U.S.C. § 1226(c), without an individualized determination of flight risk or dangerousness, violates the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT	3
ARGUMENT	9
I. Lawful Permanent Residents are Entitled to the Individualized Determination Traditionally Afforded by U.S. Criminal and Civil Detention Systems	9
II. There Is No Reasonable Basis Here for an Exception to the Due Process Rule	20
A. Numerous Less Restrictive Alternatives Can Guard Against Flight and Threats to Public Safety	21
B. Congress Did Not Review the "Actual Consequences" of Discretionary Release	25
CONCLUSION	30

TABLE OF CITED AUTHORITIES

CASES:	Page
Addington v. Texas, 441 U.S. 418 (1979)	12, 13, 14
Albillo-Figueroa v. INS, 221 F.3d 1070 (9th Cir. 2000)	5
Almendarez-Torres v. United States, 523 U.S. 224 (1998)	11
Apprendi v. New Jersey, 530 U.S. 466 (2000)	11
Aragon-Ayon v. INS, 206 F.3d 847 (9th Cir. 2000)	5
Bell v. Reno, 218 F.3d 86 (2nd Cir. 2000), *cert. denied*, 2001 WL 12704 (U.S. 2001)	5
Bell v. Wolfish, 441 U.S. 520 (1979)	10
Caballero v. Caplinger, 914 F. Supp. 1374 (E.D. La. 1996)	8
Camacho-Marroquin v. INS, 188 F.3d 649 (5th Cir. 1999)	5
Cardoso v. Reno, 127 F. Supp.2d 106 (D. Conn. 2001)	27

Cited Authorities

	Page
Carlson v. Landon, 342 U.S. 524 (1952)	19
Castro-Baez v. Reno, 217 F.3d 1057 (9th Cir. 2000)	5
Chowdhury v. INS, 249 F.3d 970 (9th Cir. 2001)	5
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	17
County of Riverside v. McLaughlin, 500 U.S. 44 (1991)	12
Cupp v. Murphy, 412 U.S. 291 (1973)	11
Ex parte Bollman, 4 Cranch 75 (1807)	11
Ex Parte Burford, 3 Cranch 448 (1806)	11
Foucha v. Louisiana, 504 U.S. 71 (1992)	10, 13, 14, 20
Fuentes v. Shevin, 407 U.S. 67 (1972)	17
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	17

Cited Authorities

	Page
Gerstein v. Pugh, 420 U.S. 103 (1975)	11, 12
Goldberg v. Kelly, 397 U.S. 254 (1970)	17
Goss v. Lopez, 419 U.S. 565 (1975)	17
Herrerta-Soto v. INS, 175 F.3d 1024 (8th Cir. 1999)	5
In re Joseph, 22 I. & N. Dec. 799, 1999 WL 339053 (BIA 1999)	10, 20
Ingraham v. Wright, 430 U.S. 651 (1977)	10
INS v. St. Cyr, 533 U.S. 289 (2001)	5, 6, 27
Jackson v. Indiana, 406 U.S. 715 (1972)	12, 14
Jones v. United States, 463 U.S. 354 (1983)	14, 15
Kamalthas v. INS, 251 F.3d 1279 (9th Cir. 2001)	6
Kansas v. Crane, 534 U.S. 407 (2002)	15

Cited Authorities

	Page
Kansas v. Hendricks, 521 U.S. 346 (1997)	15, 16, 20
Kellman v. District Director, 750 F. Supp. 625 (S.D.N.Y. 1990)	8
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	10
Kim v. Ziglar, 276 F.3d 523 (2002)	27
Leon v. I.N.S., 27 Fed. Appx. 868 (9th Cir. 2001)	5
Lettman v. Reno, 207 F.3d 1368 (11th Cir. 2000)	5
Leyva-Licea v. I.N.S., 187 F.3d 1147 (9th Cir. 1999)	5
Lopez-Elias v. Reno, 209 F.3d 788 (5th Cir. 2000)	5
Matter of Patel, 15 I. & N. Dec. 666, 1976 WL 32348 (BIA 1976)	8
Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978)	17
Morrissey v. Brewer, 408 U.S. 471 (1972)	16

Cited Authorities

	Page
Parham v. J. R., 442 U.S. 584 (1979)	12
Reno v. Flores, 507 U.S. 292 (1993)	18, 19
Rivera-Sanchez v. Reno, 198 F.3d 545 (5th Cir. 1999)	5
Santos v. Reno, 228 F.3d 591 (5th Cir. 2000)	5
Sareang Ye v. INS, 214 F.3d 1128 (9th Cir. 2000)	5
Schall v. Martin, 467 U.S. 253 (1984)	17, 18, 20
Serrano v. Estrada, 201 F. Supp.2d 714 (N.D. Tex. 2002)	28
Solorzano-Patlan v. I.N.S., 207 F.3d 869 (7th Cir. 2000)	5
United States v. Salerno, 481 U.S. 739 (1987)	10, 12, 14, 19, 21
Vargas v. Reno, 966 F. Supp. 1537 (S.D. Cal. 1997)	6
Vitek v. Jones, 445 U.S. 480 (1980)	12, 17

Cited Authorities

	Page
Walpole v. Hill, 472 U.S. 445 (1985)	17
Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002)	4
Wireko v. Reno, 211 F.3d 833 (4th Cir. 2000)	5
Wolff v. McDonnell, 418 U.S. 539 (1974)	17
Wong Wing v. United States, 163 U.S. 228 (1896)	10
Xiong v. INS, 173 F.3d 601 (7th Cir. 1999)	5
Young v. Harper, 520 U.S. 143 (1997)	17
Zadvydas v. Davis, 533 U.S. 678 (2001)	*passim*
UNITED STATES CONSTITUTION:	
Fifth Amendment	i, 1, 3, 10
Sixth Amendment	10

Cited Authorities

	Page
STATUTES:	
8 U.S.C.	
§ 1101(a)(20)	5
§ 1101(a)(43)	4, 5, 8
§ 1101(a)(48)	4
§ 1226(c)	*passim*
§ 1227(a)	5
§ 1227(a)(2)(A)(i)	4
§ 1227(a)(2)(A)(iii)	4, 6
§ 1227 (a)(2)(A)(v)	6
§ 1227(a)(2)(B)(ii)	4
§ 1231(b)(3)	6
§ 1252 (1988)	8
§ 1252 (1991)	8
18 U.S.C. § 3142(e)	22

Cited Authorities

Page

RULES:

Rules of the Supreme Court 37.3 1

Rules of the Supreme Court 37.6 1

REGULATIONS:

8 C.F.R.

§ 1.1 5

§ 263.3(c)(4) 19

OTHER AUTHORITIES:

Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L.Rev. 251 (1974) 2

Hearing on H.R. 3333 Brief the Subcomm. On Immigration, Refugees, and International Law of the House Comm. On the Judiciary, 101st Cong., 1st Sess. 71-72 (1989) 26

Statistics from Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. On Investigations of the Senate Comm. On Governmental Affairs, 103rd Cong., 1st Sess. 21 (1993) 26

Cited Authorities

Page

Statement of Joseph Greene, Acting Deputy Executive Associate Commissioner for INS Field Operations, Hearing Before the Subcommittee on Immigration and Claims of the Committee on the Judiciary, House of Representatives, 107th Cong., 1st Sess. (Dec.19, 2001) 28

Elizabeth Rapaport, *The Georgia Immigration Pardons*, 13 Fed. Sent. Rptr. 184 (2001) 6

Inspector General, U.S. Dep't. of Justice, Inspection Report, Immigration and Naturalization Service Deportation of Aliens After Final Orders Have Been Issued, Rep. No. I-96-03 (Mar. 1996) 27

Letter to the Honorable John Ashcroft, Attorney General, from Senators Leahy, Kennedy, Hatch, and Brownback (Aug. 16, 2002) 23, 24

National Institute of Justice Issues and Practices, Pretrial Services Programs: *Responsibilities and Potential*, NCJ 181939 (March 2001) 21, 22

Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, *Desktop Guide to Good Juvenile Detention Practice* (Oct. 1996) 18

ABA Criminal Justice Standards on Pretrial Release 21, 22

Cited Authorities

Page

Senate Appropriations Report 107-42, "Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Bill, 2002," 24

Testimony of Doris Meissner, Commissioner, Immigration and Naturalization Service, before the Subcommittee on Immigration Committee on the Judiciary, U.S. Senate (Sept. 16, 1998) 29

The National Association of Pretrial Services Agencies NAPSA Performance Standards and Goals for Pretrial Release (2d ed. 1998) 22

U.S. General Accounting Office, *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement* (Feb. 1999) (Oct. 1998) (July 1997) 4, 24

U.S. General Accounting Office, *Illegal Aliens: Opportunities Exist to Improve the Expedited Removal Process* (Sept. 2000) 27, 29

Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* (August 1, 2000) 9, 23

INTEREST OF THE AMERICAN BAR ASSOCIATION

Pursuant to this Court's Rule 37.3, amicus curiae American Bar Association ("ABA") respectfully submits this brief urging this Court to hold that Section 1226(c) of Title 8 of the United States Code as applied to lawful permanent residents violates the Due Process Clause of the Fifth Amendment to the Constitution.[1]

STATEMENT OF INTEREST

The American Bar Association ("ABA") respectfully submits this brief as amicus curiae pursuant to Rule 37.3 of the Rules of this Court. The ABA is a voluntary, national membership organization of the legal profession. Its more than 410,000 members, from each state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students and a number of non-lawyer associates in allied fields.

The ABA is committed to protecting the constitutional and statutory rights of immigration detainees. Since 1990, the ABA House of Delegates has maintained support for facilitating exercise of the right to counsel; for detaining asylum seekers only in extraordinary circumstances and only in the least restrictive environment necessary; and for exploring alternative means of ensuring appearance at immigration proceedings. In August 2002, the ABA reaffirmed its commitment to these

---

1. This brief is filed with the consent of both petitioners and respondent, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, the ABA states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than Amicus, its members or its counsel has made a monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption of the positions in this brief or reviewed the brief prior to filing.

principles in a resolution adopted by the House of Delegates calling for the provision of prompt custody hearings for immigration detainees before immigration judges, accompanied by meaningful administrative review and judicial oversight.

These principles are also reflected in the ABA's strong support for procedural safeguards in the criminal justice context, where the ABA has long been active. Among its most recent efforts, the ABA House of Delegates promulgated the latest edition of its Criminal Justice Standards on Pretrial Release (3d ed. 2002) (hereinafter "Pretrial Release Standards"), which represent a consensus of the legal community and contain a comprehensive set of guidelines intended to help promote fairness and balance in the criminal justice system. The first edition of the Standards was described by former Chief Justice Burger as the "single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." Burger, Introduction: The ABA Standards for Criminal Justice, 12 Am. Crim. L. Rev. 251 (1974).

These Standards are guided by the recognition that deprivation of liberty while awaiting a final determination of an individual's fate is "harsh and oppressive, subjects [individuals] to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support." Pretrial Release Standards, 10-1.1. While the Standards are addressed principally to criminal detention, the ABA believes that procedural safeguards are also critical where, as here, lawful permanent residents are awaiting a civil proceeding – often housed in criminal detention facilities[2] – to determine whether or not they may be removed permanently from this country.

2. The INS uses hundreds of facilities for immigration detention, the majority of which are state and local jails and correctional institutions where the INS contracts for bed space. This creates the anomaly of civil administrative detainees being incarcerated alongside criminal defendants and inmates serving criminal sentences but without any of (Cont'd)

The ABA appears as amicus curiae in this proceeding because the question presented herein has serious implications for the administration of justice and, in particular, for the constitutional right of lawful permanent residents to a forum in which their challenge to the need for detention may be heard.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This case presents the narrow question whether the mandatory detention of lawful permanent residents under 8 U.S.C. § 1226(c), without an individualized determination of flight risk or dangerousness, violates the Due Process Clause of the Fifth Amendment. The sole relief Respondent Mr. Kim seeks is an individualized hearing in which he may demonstrate that his detention is not necessary to ensure his appearance at subsequent proceedings or to protect the community. Mr. Kim asserts only that due process entitles him to a demonstration that the Government has some particularized reason why depriving him of his liberty is necessary to secure the legitimate state interests the Government says it seeks. As this Court has recognized time and again, lawful permanent residents in this country enjoy the protection of the Fifth Amendment to the Constitution: no "person" in this country may be deprived of physical liberty without due process of law. By denying lawful permanent residents a meaningful opportunity to be heard before detaining them for an unspecified period, Section 1226(c) deprives these individuals of a liberty interest that the Constitution presumes they retain.

At the same time, this case does *not* require the Court to test the Government's power to detain those individuals who *are* found to pose a danger to the community or present a particular risk of flight. Mr. Kim has resided in the United States since he was a child. Petitioner's Brief ("Petr. Br."), 3. Under

(Cont'd)
the procedural safeguards that are the norm in the criminal justice context. The ABA estimates that more than 55% of immigration detainees are incarcerated in penal facilities while awaiting their immigration hearings.

the challenged statute, Mr. Kim may be subject to mandatory detention for committing an offense no more inherently "dangerous" than tax evasion or shoplifting. 8 U.S.C. § 1226(c); 8 U.S.C. § 1101(a)(43). Indeed, because what counts as a "conviction" or "term of imprisonment" is uniquely defined under the 1996 immigration law (for example, a "term of imprisonment" can include a suspended sentence), an immigrant like Mr. Kim who is mandatorily detained under Section 1226(c) may never previously have spent a day in jail. *See* 8 U.S.C. § 1101(a)(48).[3] Moreover, contrary to the Government's assertion, only a tiny fraction of immigrant "aggravated felons" like Mr. Kim released under the discretionary provision that preceded Section 1226(c) ever engaged in felony activity again. According to the INS Law Enforcement Support Center, of nearly 1200 potentially removable "aggravated felons" who were released from prison, only 15 were subsequently convicted of additional felony charges – a recidivism rate of just 1.25%.[4] And detention may extend for years because, while there is a "clearly identifiable event marking completion of the detention period (i.e. issuance of a final order)," there is no "clearly identifiable deadline by which that event must take place." *Welch v. Ashcroft*, 293 F.3d 213, 227 (4th Cir. 2002).

This case likewise does not involve individuals who have been finally determined to be subject to removal. Mr. Kim has a right under federal law to reside permanently in the United States, and to remain in this country until a final order of removal

3. Mr. Kim was detained under the portion of the statute mandating detention for individuals who are facing deportation for a wide variety of offenses, including drug addiction, 8 U.S.C. § 1227(a)(2)(B)(ii); "moral turpitude crimes," *id.* § 1227(a)(2)(A)(i); and "convictions" for offenses classified as "aggravated felonies," *id.* § 1227(a)(2)(A)(iii). Under 8 U.S.C. § 1101(a)(43), an "aggravated felony" includes offenses that are typically considered misdemeanors or minor crimes.

4. U.S. General Accounting Office, Criminal Aliens: *INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement*, at 3 (Feb. 1999).

has been entered. 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1.1(p). Courts have uniformly recognized their jurisdiction to determine whether the conviction for which the INS seeks removal was an "aggravated felony" under 8 U.S.C § 1227(a),[5] and many like Mr. Kim have successfully disputed the classification of their convictions under 8 U.S.C. § 1101(a)(43).[6] Moreover, as this Court has made clear, a "great number" of individuals convicted of "aggravated felonies" remain eligible for discretionary relief after the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). *INS v. St. Cyr*, 533 U.S. 289, 323 (2001).[7] And the statute itself provides

5. *See, e.g., Bell v. Reno*, 218 F.3d 86 (2nd Cir. 2000), *cert. denied*, 2001 WL 12704 (U.S. 2001); *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000); *Camacho-Marroquin v. INS*, 188 F.3d 649 (5th Cir. 1999), *opinion withdrawn on other grounds, reh'g dismissed*, 222 F.3d 1040 (5th Cir. 2000); *Herrerta-Soto v. INS*, 175 F.3d 1024 (8th Cir. 1999); *Albillo-Figueroa v. INS*, 221 F.3d 1070 (9th Cir. 2000); *Aragon-Ayon v. INS*, 206 F.3d 847 (9th Cir. 2000); *Castro-Baez v. Reno*, 217 F.3d 1057 (9th Cir. 2000); *Lettman v. Reno*, 207 F.3d 1368 (11th Cir. 2000).

6. *See, e.g., Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000); *Santos v. Reno*, 228 F.3d 591 (5th Cir. 2000); *Rivera-Sanchez v. Reno*, 198 F.3d 545 (5th Cir. 1999); *Xiong v. INS*, 173 F.3d 601 (7th Cir. 1999); *Solorzano-Patlan v. I.N.S.*, 207 F.3d 869 (7th Cir. 2000); *Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001); *Sareang Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000); *Leyva-Licea v. I.N.S.*, 187 F.3d 1147 (9th Cir. 1999); *Leon v. I.N.S.*, 27 Fed. Appx. 868 (9th Cir. 2001).

7. *St. Cyr* carves out a significant exception to IIRIRA's denial of discretionary relief for aggravated felons by preserving discretionary relief for aliens "whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § [1226 (c)] relief at the time of their plea under the law then in effect." 533 U.S. at 326. By the Court's own estimation, the impact of its decision is sweeping, since the number of aliens who relied on Section 1226(c) prior to the passage of IIRIRA "is extremely large," *id.* at 295-96 (noting that in years immediately prior to the statute's passage more than 50% of the applicants under Section 1226(c) were granted relief) and that 90% of convictions are through guilty pleas, *id.*

(Cont'd)

several avenues by which immigrants who have been convicted of an aggravated felony under section 1227(a)(2)(A)(iii) may avoid removal altogether.[8] In short, the fact that a lawful permanent resident has a prior "conviction" does not, of itself, establish that he is subject to deportation or will be ordered deported.

In view of the limited nature of the case presented, Amicus confines its discussion here to two key points supporting the Court of Appeals' decision: (1) an individualized determination of the reasons why the absolute deprivation of liberty is necessary is the touchstone of U.S. civil and criminal detention systems, and (2) mandatory detention for every immigrant pending a deportation determination is both unnecessary and grossly out of step with standard methods for ensuring appearance and protecting the public in analogous civil or criminal detention systems in the United States.

(Cont'd)
at 323-25, n.51, n.54. Moreover, because IIRIRA "expanded the definition of 'aggravated felony' substantially" to include "more minor crimes which may have been committed many years ago," an "increased percentage of applicants will meet the stated criteria for § [1226(c)] relief." *Id.* at 296 n.6. Finally, an individual may avoid deportation if he has been pardoned for his offense. 8 U.S.C. § 1227(a)(2)(A)(v); *see also* Elizabeth Rapaport, *The Georgia Immigration Pardons*, 13 Fed. Sent. Rptr. 184 (2001).

8. An immigrant may not be removed if the Attorney General decides (1) that removal to a particular country might threaten the alien's life or freedom because of the alien's race, religion, nationality, membership in a particular social group, or political opinion, and (2) the alien has not participated in persecution, has not committed a particularly serious crime, and does not pose a danger to the United States. 8 U.S.C. § 1231(b)(3). Removal may also be avoided through private legislation from Congress, *see Vargas v. Reno*, 966 F. Supp. 1537, 1549 (S.D. Cal. 1997), or under international treaties, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *see Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001).

Where the Government seeks to deprive an individual of a significant liberty interest, this Court has left no question that due process demands a determination that the Government's legitimate purposes are served by the deprivation in the individual case. This rule is past question when the Government's purpose in detention is punitive. It is equally essential when the Government's purpose is *preventive*. This principle is borne out in this Court's due process jurisprudence governing pretrial detention of arrestees; post-conviction termination of parole rights; the civil system of juvenile detention (for citizens and immigrants alike); and civil commitment of the mentally ill – *even when* commitment follows a jury finding of not guilty by reason of insanity. Without exception, the same rule has governed this Court's decisions regarding immigrants present in the United States. The insistence on individualized determinations in all of these contexts is with good reason. As the Court has recently emphasized, absent a statement of particular reasons why detention in the individual case is necessary, preventive detention related to immigration proceedings could become simply an easier mechanism for the Government to inflict punishment.

As the Court has also made clear, a legitimate purpose alone is not enough to justify the absolute deprivation of liberty when alternative, less restrictive methods are available that serve the Government's asserted interests equally well. Here, there is no basis for a conclusion that detention is the sole solution. Despite the Government's heavy reliance on categorical statistics – suggesting that immigrants invariably pose a risk of flight or danger – the evidence regarding lawful permanent residents in this country points to just the opposite conclusion.

The categories of individuals subject to detention pending the outcome of deportation proceedings have changed repeatedly in the past fifteen years. As a result, statistics and legislative history purporting to describe the "actual consequences" of discretionary release during this period cannot be readily compared, and until 1996, demonstrate nothing about the

consequences of discretionary release of lawful permanent residents following a bond hearing. Before 1988, *everyone* subject to deportation hearings was entitled to a bond hearing and was presumptively eligible to be released. *Matter of Patel*, 15 I. & N. Dec. 666, 1976 WL 32348 (BIA 1976). Between 1988 and 1990, any immigrant (legal or illegal) who had been convicted of an "aggravated felony" – then defined narrowly to include only murder, drug trafficking, and trafficking in firearms – was to be detained without bond. Former 8 U.S.C. § 1101(a)(43), § 1252 (1988). Courts soon concluded that this restriction was unconstitutional. *See, e.g., Kellman v. District Director*, 750 F. Supp. 625, 626-27 (S.D.N.Y. 1990); *Caballero v. Caplinger*, 914 F. Supp. 1374, 1376-77 (E.D. La. 1996) (citing cases). Accordingly, in 1990, Congress amended the law again to expand eligibility for bond – lawful permanent residents were again eligible for custody hearings and release. Just a year later, "lawfully admitted" immigrants were added to those eligible for release (even if currently in unlawful status). Former 8 U.S.C. § 1252 (1991). In 1996, Congress substantially expanded the types of crimes deemed to be "aggravated felonies," but the INS retained discretion to release "lawfully admitted" immigrants after a bond hearing until 1998.

Because of these numerous changes, statistics purporting to describe recidivism or absconding by "aliens" during this period in fact describe widely differing groups of immigrants. They provide no basis for demonstrating that, as the Government would suggest, mandatory detention works and discretionary release does not. As important, only recently has there been *any* information about what happens to the current class of "aggravated felons" when released following an individual determination of flight risk or dangerousness. The single study during the relevant period that does examine how lawful permanent residents like Mr. Kim fared upon discretionary release pending deportation hearings found appearance rates of

90% or better. Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* (August 1, 2000).[9]

Likewise, for lawful permanent residents, any number of conditioned or supervised release programs can more than adequately satisfy the Government's interests in ensuring court appearances and protecting the public. Indeed, immigration detention is the only context in the United States in which such conditional release programs are not employed as a matter of course. Pretrial services programs in the criminal justice system have been the norm for the past four decades – to enormously beneficial effect. Moreover, the single such pilot program that has been conducted in the immigration context has demonstrated the overwhelming effectiveness of even a modicum of post-release supervisory assistance.

Everything that has been learned from conditional or supervised release programs in these contexts points to the same conclusion: long-term members of a community, who have close ties to that community, are overwhelmingly likely to satisfy all conditions of release and appear at court proceedings as scheduled. Despite the Government's suggestion otherwise, there is no evidence reasonably supporting the conclusion that immigration detention alone must operate outside the bounds of standard practice in the United States. Rather, the INS, like every other law enforcement body, should employ conditions of release that are no more extensive than necessary to accomplish the Government's stated goals.

ARGUMENT

I. Lawful Permanent Residents are Entitled to the Individualized Determination Traditionally Afforded By U.S. Criminal and Civil Detention Systems

Freedom from physical detention "lies at the heart" of the liberty interest that the Due Process Clause protects. *Zadvydas*

9. The Vera Institute study is discussed in greater detail below.

v. Davis, 533 U.S. 678, 690 (2001); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *United States v. Salerno*, 481 U.S. 739, 750 (1987). Because detention involves a complete deprivation of all personal liberty, due process requires that it may be imposed only through a process that affords considerable procedural protections. While the scope of procedures afforded may vary depending on the length and nature of the detention at issue, due process has always required some independent arbiter to determine that the Government's legitimate purposes justify the deprivation of liberty in the individual case.

In this case, the Government asserts two interests supporting the detention of lawful permanent residents who have not yet been found deportable: (1) the risk that they will fail to appear for subsequent court proceedings ("flight risk"); and (2) the risk that, if released, they will pose a danger to the public. Petr. Br. at 12. While insisting that such individuals are afforded ample hearing prior to their detention under Section 1226(c), Petr. Br. at 26-27 (citing *In re Joseph*, 22 I. & N. Dec. 799, 1999 WL 339053 (BIA 1999)), the Government can point to no determination at any stage as to whether the individual is in fact a flight risk or a danger. Indeed, there is no individual hearing evaluating whether there is *any* relationship between the Government's asserted interests and the deprivation to be inflicted. In this respect, Section 1226(c) falls short of every other detention scheme this Court has approved.

Due process requirements are stringent and unconditional where the state seeks to detain an individual as punishment for a crime. The Government may not sentence a person to imprisonment absent a finding of guilt. *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979); *see also Ingraham v. Wright*, 430 U.S. 651, 671-672 n. 40, 674 (1977); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165, 167, 186 (1963); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). Indeed, between the "Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must

be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).[10] Punitive detention outside the strictures of these protections may not be imposed.

Where the Government's asserted interest is preventive, rather than punitive, the procedural safeguards required are only slightly less exacting. But they invariably include the requirement that detention of an individual serves the purposes the Government seeks to advance. Thus, the Government may not detain a person on suspicion of having committed a crime for any substantial period absent an individualized showing that there is reason to believe that the person committed the crime. *See, e.g., Cupp v. Murphy*, 412 U.S. 291, 294-95 (1973); *Ex parte Bollman*, 4 Cranch 75 (1807); *Ex parte Burford*, 3 Cranch 448 (1806). Recognizing the "necessary accommodation between the individual's right to liberty and the State's [regulatory] duty to control crime," this Court determined that arrest by an officer on the street could be accompanied by a simple finding of probable cause to believe that the individual to be detained "had committed or was committing an offense." *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). But once the individual has been detained, the Government's reasons for avoiding the delay of an individualized hearing lest a crime be committed no longer apply, and a prompt judicial determination is required. "The consequences of prolonged detention may be more serious than the interference occasioned by arrest, . . . imperil[ing] the suspect's job, interrupt[ing] his source of income, and impair[ing] his family relationships." *Id.* at 114. Indeed: "When the stakes are this high, the detached

10. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which remains a narrow exception to the *Apprendi* rule, does not alter the analysis. There, the fact that the defendant had a prior conviction was itself sufficient to increase his sentence. The fact of prior conviction *was not* used as an irrebuttable proxy for a determination that defendant was dangerous or posed a risk of flight.

judgment of a neutral magistrate is essential" to justify an "extended restraint of liberty." *Id.* at 114; *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (probable cause hearing must be held within 48 hours of arrest).

Likewise, in upholding the 1984 Bail Reform Act, the Court relied on the existence of an individualized process for considering whether to permit release on bail before allowing a federal court to detain an arrestee pending trial. Balancing the same set of interests – individual liberty against the Government's "regulatory" goal of preventing danger to the community – this Court upheld the Act based on its series of strict procedural protections. *Salerno*, 481 U.S. at 747. Among other things, the Government was required to demonstrate by clear and convincing evidence after a "full-blown" adversarial hearing that *no conditions of release* could "reasonably assure the safety of the community or any person." *Id.* at 742-51. Further, the Act operated only on arrestees charged with "extremely serious offenses," and detention was subject to the "stringent time limitations" of the Speedy Trial Act. *Id.* at 747-50. As the Court explained, the "extensive" procedural safeguards set forth by the Act were "specifically designed to further the accuracy of [the] determination" in the individual case. *Id.* at 751.

Because civil commitment implicates precisely the same, powerful liberty interest as imprisonment, this Court has repeatedly recognized that an individualized determination of reasons is precisely as essential. There is plainly a substantial liberty interest in avoiding confinement in a mental hospital. *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980) (commitment entails "a massive curtailment of liberty,"); *Parham v. J. R.*, 442 U.S. 584, 600 (1979); *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (due process requires at least that the nature and duration of commitment to a mental hospital "bear some reasonable relation to the purpose" of the commitment). Accordingly, the Court has required the use of exacting – and manifestly individualized – procedural

protections to guard against error in allowing for civil detention of the mentally ill.

Thus, in *Addington v. Texas*, this Court invalidated a Texas civil commitment statute because it lacked a sufficiently demanding standard of proof to justify depriving an individual of his liberty. *Addington* arose from a petition by the appellant's mother for his involuntary commitment. Under Texas law, the son was entitled to retain counsel, and trial was held before a jury to determine whether he could be committed. *Addington*, 441 U.S. at 420. Despite the substantial procedural protections Texas law already provided, this Court held that the standard of proof the state Supreme Court accepted, a "preponderance of the evidence," was insufficiently strict given the magnitude of the liberty interest involved. While the state "has a legitimate interest" in providing care to its citizens, and in protecting the community from those who may pose a danger, "the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others." *Id.* at 426. As this Court explained: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Id.* at 427. Accordingly, states must meet a burden "equal to or greater than the 'clear and convincing' standard" to satisfy due process constraints. *Id.* at 433.

Particularly when commitment is employed as an alternative to criminal detention, procedural protections must include an individualized finding to support it. In *Foucha v. Louisiana*, 504 U.S. 71, 81-82 (1992), the Louisiana law at issue automatically committed defendants found not guilty by reason of insanity on the grounds that such a verdict established that the defendant was dangerous. The state could then continue to detain such defendants indefinitely without any adversarial hearing in which the state was required to demonstrate that the defendant was actually dangerous. *Id.* The Court held the Louisiana law unconstitutional, finding that the law did not even

approach the Bail Reform Act requirement upheld in *Salerno*, which provision required the Government to show that the "arrestee presents an identified and articulable threat to an individual or the community." *Id.* at 81; *see also Addington*, 441 U.S. at 425-26; *Jackson*, 406 U.S. at 738 (state may not detain defendant who lacks capacity to stand trial without satisfying procedures for civil commitment). Among other things, *Foucha* plainly rejects the notion that because a finding in a criminal proceeding might logically support administrative detention, such detention is, irrebuttably, justified in every case.

Jones v. United States, 463 U.S. 354 (1983), demonstrates precisely the same point. There, the Court held that a state may commit a defendant to a mental hospital upon a verdict of not guilty by reason of insanity. At the very outset of its discussion, the Court made clear that such a verdict was sufficiently probative of mental illness justifying institutionalization because the verdict itself established the fact that defendant "committed the act because of mental illness." *Id.* at 363-64. While the *Jones* Court also found that evidence of "violence" per se was not a "prerequisite for a constitutional commitment," *id.* at 365 (suggesting that petitioner's conviction itself was probative of dangerousness), the Court has since emphasized that it would not be permissible to assume this in every case "without regard for [the individual's] particular crimes." *Foucha*, 504 U.S. at 88 (O'Connor, J., concurring) ("[T]he strong interest in liberty of a person acquitted by reason of insanity but later found sane might well outweigh the governmental interest in detention where the only evidence of dangerousness is that the acquittee committed a non-violent or relatively minor crime."). In this case, Mr. Kim's simple verdict of theft with priors establishes no fact relating to his flight risk, no fact demonstrating his deportability, and no evidence supporting a finding of dangerousness.[11]

11. In any event, the insanity acquittees subject to the District of Columbia detention scheme in *Jones* were at least entitled by law to a (Cont'd)

The Court again highlighted the importance of this principle in the context of civil commitment just last Term in *Kansas v. Crane*, 534 U.S. 407 (2002) (Constitution prohibits civil commitment of a convicted sexual offender absent some specific finding that the offender lacked the ability to control his behavior). In reaching its conclusion, the Court followed closely the guidance of *Kansas v. Hendricks*, 521 U.S. 346 (1997), which upheld a civil commitment statute targeting sexual offenders. As the Court explained: "*Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.'" *Crane*, 534 U.S. at 412 (quoting *Hendricks*, 521 U.S. at 360). That distinction, the Court emphasized, "is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence.'" *Id.*

The distinction – and the requirement that a court make a specific finding of flight risk or dangerousness despite a prior conviction – is just as essential in the ostensibly non-punitive context of immigration detention. "Whether a due process right is denied when [here, potentially] removable aliens who are flight risks or dangers to the community are detained turns," at least in part, "on whether there are adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large." *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting). Government detention violates due process unless there exists, at a minimum, some "special justification" for detention that "outweighs the 'individual's constitutionally protected interest in avoiding physical

(Cont'd)
hearing within 50 days of commitment at which they would have an opportunity to demonstrate that they were no longer mentally ill or dangerous. 463 U.S. at 357-58. The immigration statute here promises no such assessment – of flight risk or dangerousness – at any point.

restraint.'" *Zadvydas v. Davis*, 533 U.S. 678, 690 (quoting *Hendricks*, 521 U.S. at 356). To determine whether such a "special justification" exists, this Court has always required that non-punitive detention be based on a "special," individual assessment.

The liberty interest of a lawful permanent resident in such an individual determination is no weaker because he *may*, as a result of his prior conviction, be deportable. Just as the liberty interest of a parolee is still cognizable even though he may well be subject to re-incarceration, the mere *possibility* of deportation that exists here does not of itself suffice to eliminate respondents' powerful interest in living at liberty in this country for as long as they may remain.

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison . . . We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others.

Morrissey v. Brewer, 408 U.S. 471, 482 (1972). Accordingly, even where an individual's liberty interest is arguably weakened, due process requires a case-by-case determination – not that the individual committed a crime in the first instance – but that the current deprivation of liberty is justified anew. That rule

holds for the termination of pre-parole conditional supervision programs, *Young v. Harper*, 520 U.S. 143 (1997) (opinion of unanimous Court); the revocation of probation, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); the revocation of prison good-time credits, *Walpole v. Hill*, 472 U.S. 445, 454 (1985); and for involuntary transfer from a prison to a mental institution, *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (inmate's "residuum of liberty" demands that the state satisfy "minimum requirements of due process" before proceeding with transfer).[12]

The requirement of an individualized assessment of the need for detention likewise applies without exception in the context of civil juvenile detention – where, as this Court has asserted, due process liberty interests may also be diminished. In *Schall v. Martin*, 467 U.S. 253 (1984), this Court upheld a New York statute allowing for pretrial detention of a juvenile after an individualized finding that the arrested juvenile posed a "serious risk" of committing a crime before his return date. *Id.* at 255. The *Schall* Court emphasized that the important risk of "erroneous and unnecessary deprivations of liberty" was checked by the fact that "notice, a hearing, and a statement of facts and

12. Even where the individual due process interest is significantly less than the total deprivation of liberty effected by detention, the Constitution affords individuals, at a minimum, an "opportunity to present reasons . . . why proposed action should not be taken." *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) ("'[T]he root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest'"; hearing required before termination of employment); *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (hearing required before cutting off utility service); *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (at minimum, due process requires "some kind of notice and . . . some kind of hearing" before suspension of students from public school); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) (hearing required before forfeiture of prisoner's good-time credits); *Fuentes v. Shevin*, 407 U.S. 67, 80-84 (1972) (hearing required before issuance of writ allowing repossession of property); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (hearing required before termination of welfare benefits).

reasons are given prior to any detention. . . . [and a] formal probable-cause hearing is then held within a short while thereafter, if the factfinding hearing is not itself scheduled within three days." *Id.* at 274, 277. Since *Schall*, virtually all state juvenile court acts have adopted specific requirements about who may be detained pending adjudication; have required a judicial detention hearing following soon after admission to detention; and have strictly limited the duration of pretrial detention. Indeed, under most state codes, only those charged with criminal offenses may be detained pre-adjudication for any length of time. At the detention hearing, the state bears the burden of proving reasonable cause for believing that the minor has committed an offense, and that detention – as opposed to any other less restrictive alternative – is necessary. Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, *Desktop Guide to Good Juvenile Detention Practice*, at 27-28 (Oct. 1996).[13]

In *Reno v. Flores*, 507 U.S. 292, 297 (1993), the Court reaffirmed these principles in the context of immigration proceedings involving juveniles. There, the Court considered INS regulations permitting juveniles who are detained pending deportation hearings to be released only to their parents, close relatives, or legal guardians. In contrast to this case, the *Flores* regulations preserved the INS district director's discretion in "unusual and compelling circumstances" to release the juvenile to some other adult and the juvenile was entitled to appeal a refusal of release. *Id.* at 310. While concluding that juveniles' interest in "freedom from physical restraint" was less powerful

13. The ABA's Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition likewise recognize the importance of such procedural protections. Under these standards, an accused juvenile taken into custody should be accorded a hearing in court within a day of the filing of a petition for a release hearing. The burden is on the state to show probable cause to believe that the juvenile has committed an offense charged, and the juvenile is entitled to actual notice of the hearing and the presence of an attorney. *Id.*, Standard 7.6.

than adults', *id.* at 302, the *Flores* Court emphasized that the regulations afforded juveniles substantial protection: the INS district director had discretion, subject to review in a hearing before an immigration judge, to release a juvenile to an unspecified custodian, *id.* at 313-14; 8 C.F.R. § 263.3(c)(4). Under these circumstances, the Government's suggestion that *Flores* somehow *approves* non-discretionary, *mandatory* detention of *adults* in the same context cannot withstand scrutiny.

In contrast to all of the foregoing, the cases cited by the Government do not suggest that an irrebuttable presumption of flight risk or dangerousness can justify non-punitive detention. Particularly in *Carlson v. Landon*, the Court upheld the Attorney General's authority to detain Communist aliens pending hearings, but emphasized that he retained discretion, subject to judicial review, to grant bail when appropriate. 342 U.S. 524, 544 (1952) ("Of course purpose to injure could not be imputed generally to all aliens subject to deportation, so discretion was placed by the 1950 Act in the Attorney General to detain aliens without bail. . . ."); *id.* at 543-44 ("[T]he Attorney General is not left with untrammeled discretion as to bail. Courts review his determination. Hearings are had, and he must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity."). A presumption against granting bail to certain classes of persons must be distinguished from a categorical refusal even to evaluate a person's flight risk and dangerousness.[14]

Finally, the Government's suggestion that a pre-detention determination of deportability satisfies any constitutional

14. *See Salerno*, 481 U.S. at 765 n.6 (Marshall, J., dissenting)

> The majority states that denial of bail in capital cases has traditionally been the rule rather than the exception. And this of course is so, for it has been the considered presumption of generations of judges that a defendant in danger of execution has an extremely strong incentive to flee. If in any particular case the presumed likelihood of flight should be made irrebuttable, it would in all probability violate the Due Process Clause.

requirement relating to detention misses the point. Petr. Br. at 26-27 (citing *In re Joseph*, 22 I. & N. Dec. at 806, 1999 WL 339053, at *6-7). Whether a person falls within the class of immigrants who may be *deportable* under Section 1226(c) does not resolve whether they should be *detained* – based on flight risk or dangerousness – while the Government determines whether or not they may be deported. As this Court has recognized, even an immigrant who has been ordered deported (which Mr. Kim has not) retains a cognizable liberty interest. *See Zadvydas*, 533 U.S. at 679-80, 696. Thus, regardless of whether an immigrant may be *deportable*, the Government may not *detain* him pending further proceedings unless the Government also has a "special," particularized reason for doing so. *See Foucha*, 504 U.S. at 81-82.

II. There Is No Reasonable Basis Here for an Exception to the Due Process Rule

The ABA agrees that ensuring appearances in immigration proceedings and protecting the public are legitimate Government interests. But "the mere invocation of a legitimate purpose," *Schall*, 467 U.S. at 269, is not enough to justify the mandatory detention, for an unknown period of time, of lawful permanent residents who are not being punished for a crime. Rather, when less restrictive alternatives are equally capable of serving the Government's interests in public safety and speedy process, due process plainly favors their use. *Zadvydas*, 533 U.S. at 690 (Government must present "special justification" for detention that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint'" (quoting *Hendricks*, 521 U.S. at 356)); *Salerno*, 481 U.S. at 747 (detention for a non-punitive purpose must not be "excessive" means of fulfilling Government purpose); *id.* at 750 (upholding federal pretrial detention scheme only in the "narrow circumstances" where a neutral magistrate had found that "*no conditions of release* can reasonably assure the safety of the community") (emphasis added). This disposition toward liberty rather than detention

unless necessary is part of the fabric of the U.S. judicial system.[15] As this Court has very recently emphasized: "The choice . . . is not between imprisonment and the alien 'living at large.' It is between imprisonment and supervision under release conditions that may not be violated." *Zadvydas*, 533 U.S. at 696 (citations omitted).

A. Numerous Less Restrictive Alternatives Can Guard Against Flight and Threats to Public Safety

Any number of "conditions of release" can more than adequately satisfy the Government's asserted interests here. Indeed, such conditioned release programs have long been the norm in United States criminal and civil detention schemes. Limited by continually strained resources, and driven by the same due process concerns that have animated the Court's jurisprudence in this area, jurisdictions throughout the country make it standard practice to avoid unnecessary detention and to conduct individual assessments of individuals' suitability for some form of release. Pretrial release programs for criminal suspects awaiting trial have been implemented in more than 300 counties and in all 94 districts in the federal court system. National Institute of Justice Issues and Practices, Pretrial Services Programs: *Responsibilities and Potential*, NCJ 181939, at 8 (March 2001) (hereinafter "DOJ Pretrial Services Survey"). In fact, immigration detention is the only area in which supervised release programs are not pursued as a matter of course.

To ensure that courts reach objective and consistent decisions regarding release, the ABA has urged that every jurisdiction establish a pretrial services agency to collect information and risk assessments, to monitor and assist released

---

15. The reasons for this presumption are plain: "Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support." Pretrial Release Standards, Standard 10-1.1.

defendants, and to review the status (and eligibility for release) of detained defendants. Pretrial Release Standards, Standard 10-1.10.[16]

In keeping with these standards, pretrial services programs have been operating for the past four decades and now vigorously perform two key functions: supervising defendants who are released from custody while awaiting trial, and gathering information about newly arrested defendants and available release options for use by a judicial officer who will be determining the defendant's custody or release status. *See generally* DOJ Pretrial Services Survey. Most programs manage the risk of harm to the public or nonappearance in court by monitoring defendants' compliance with conditions of release (such as regular phone or in-person check-ins, movement restrictions, or electronic monitoring, and, in certain cases, confinement). *Id.* at 37-48. Through their decades of accumulated experience, these programs have taught law enforcement a great deal about strategies that can dramatically improve appearance rates (including numerous steps as simple as reminding defendants of upcoming court appointments) and manage risk to the public. *Id.*

---

16. The ABA maintains that courts should employ "the least restrictive condition(s) of release that will reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses or any other person." *Id.* Standard 10-1.2. Only if it can be determined that "no conditions of release" would satisfy these needs may defendants be detained. *Id.; see also* 18 U.S.C. § 3142(e)

> If, after a hearing pursuant to the provisions of subsection (f), . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before to trial.

The National Association of Pretrial Services Agencies (NAPSA) Performance Standards and Goals for Pretrial Release, Standard I & comm. at 4 (2d ed. 1998).

Recognizing that such programs had tremendous potential for relieving its perennially overburdened detention system, the INS commissioned a study by a well-known nonprofit research organization to determine whether various supervised release techniques – from monitoring through regular phone and in-person appearances before program staff to providing regular reminders of court hearings and referrals to relevant services – could boost appearance rates at deportation proceedings. Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* (August 1, 2000).[17] Although the appearance rates of the lawful permanent residents who had served criminal sentences was already quite high (89%) without any supervisory assistance, when these individuals were given the benefit of even limited appearance assistance support, their appearance rate exceeded 94%. *Id.* at 33-36.[18] In the end, about 90% of all of the supervised immigrants participating in the program appeared at all court hearings. As the bipartisan leadership of the Senate Judiciary Committee recognized, "[t]he results from the Vera Institute's program exceeded expectations, resulting in . . . an impressive appearance rate at court hearings." Letter to the Honorable John Ashcroft, Attorney General from Senators Leahy, Kennedy, Hatch, and Brownback (Aug. 16, 2002) (hereinafter "Ashcroft Letter").

Because the pilot program so exceeded expectations, Congress last year allocated $3 million for the implementation

17. The Vera Institute Appearance Assistance Program study was conducted between 1997 and 2000, and involved 534 participants, 127 of whom were presumptively subject to removal and detention based on their criminal convictions. Of this 127, all but six were lawful permanent residents. The Vera Institute study remains, to the ABA's knowledge, the sole effort to examine the appearance rates of the class of immigrants at issue in this case.

18. Indeed, the lawful permanent residents involved in the study consistently demonstrated a higher appearance rate (with assistance or without) than any other immigrant group studied, including political asylum seekers and undocumented immigrant workers.

of "alternatives to detention" programs. Senate Appropriations Report 107-42, "Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Bill, 2002," p. 40. As a recent letter from the members of the Senate Judiciary Committee responsible for adding these appropriations makes clear, P.L. 107-77 "specially directed" the Department of Justice to devote these funds to using "community-based organizations to screen asylum seekers and other INS detainees for community ties, provide them with necessary services and help to assure their appearance at court hearings." Ashcroft Letter.

In all events, the INS could fail to pursue the release program Congress has authorized and still employ a far less restrictive approach to determining removability – an approach that imposes no additional burden on the liberty of the individual potentially subject to removal. As the INS has long recognized, unnecessary detention can be avoided entirely simply by identifying those who are potentially deportable and conducting deportation hearings *while they are still incarcerated for a criminal offense*. U.S. General Accounting Office, *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement* (Feb. 1999); *see also id.* (Oct. 1998 edition); *id.* (July 1997 edition). Faced with concerns that it was failing to identify potentially deportable immigrants while they were still in prison, the INS began efforts to implement an "Institutional Hearing Program" ("IHP") – an effort to ensure that potentially deportable immigrants were identified while still incarcerated, and subject to removal hearings during that same period, without the need for indefinite detention past the expiration of their sentences. The GAO found repeatedly that the INS had simply failed to identify these individuals while they were still serving their criminal sentences. As a result, the INS was forced to detain immigrants who did not complete the removal hearing process in prison (incurring on the order of $40 million in avoidable detention costs in the process). Perhaps worst of all, those immigrants whose deportation hearings happened to start *before* they were released

from prison faced an average of 23 additional days in detention; for those whose hearings were commenced *after* their release, individuals were subject to an average of 88 additional days in detention. *Id.* (Oct. 1998 Edition) at 36.

Taking into account the INS' ongoing IHP program, the Vera Institute's pilot Appearance Assistance Program, and Congress' own insistence that the INS pursue such alternatives to detention with the money Congress expressly earmarked for that purpose, there can be no justification for insisting upon mandatory detention of the class of immigrants here – lawful permanent residents – who are most likely to appear in court of their own accord.

B. Congress Did Not Review the "Actual Consequences" of Discretionary Release

The Government maintains that "[t]he mandatory detention requirement of 8 U.S.C. § 1226(c) is the product of Congress's close scrutiny of the actual consequences of allowing release of criminal aliens." Petr. Br. at 8. In fact, the Government presents no "actual" support for the conclusion that immigrants who fall within the definition of Section 1226(c) must be detained in order to protect the public or to guard against the risk of flight. On the contrary, as discussed above, the statistical and experiential evidence that does exist supports just the opposite conclusion.

The vast majority of the evidence in legislative history cited by the Government in support of its description of the "scrutiny" Congress applied was not in fact before the Congress that passed Section 1226(c) in 1996. As has been noted, *supra* at 7-8, the mandatory detention policy challenged here was adopted in 1996 and put into effect for the first time in 1998. Before that, policy regarding the disposition of immigrants pending deportation hearings changed repeatedly – sometimes annually – with successive new enactments. The evidence cited by the Government from legislative history preceding *earlier* amendments to the Immigration and Naturalization Act cannot

be said to have led the 1996 Congress to an "ineluctabl[e] conclu[sion]," Petr. Br. at 21, about anything, much less about the need for the particular mandatory detention provision then enacted and now at issue in this case.[19] Worse, the evidence cited that was before these earlier congresses vacillates randomly between statistics describing the behavior of illegal entrants to the United States (only *legal* permanent residents are at issue in this case), and "aliens" generally without any description of whom this category includes.[20] Much of the rest of the legislative history cited by the Government is either inapposite (speaking to Congress' concern generally about the slow pace of removal, not the need for mandatory detention to speed things up), or would tend to lead Congress to just the opposite conclusion as the one the Government now maintains it reached. *See, e.g.*, Petr. Br. at 18 (citing high costs of incarceration and contribution to prison overcrowding resulting from detention of immigrants). Most striking in the Government's catalog of legislative history is the complete absence of any evidence that the Congress, in enacting the latest Section 1226(c), devoted any time to weighing the necessity of mandatory detention for *all* immigrants potentially subject to deportation.

Having found no comfort in the record actually before Congress when Section 1226(c) was enacted, the Government

---

19. *See, e.g.*, Petr. Br. at 13 (quoting reasoning from 133 Cong. Rec. 28,840-41 (1987)); *id.* at 16-17, 20 (studies cited in Hearing on H.R. 3333 Brief the Subcomm. On Immigration, Refugees, and International Law of the House Comm. On the Judiciary, 101st Cong., 1st Sess. 71-72 (1989)); *id.* at 17-21 (*Statistics from Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. On Investigations of the Senate Comm. On Governmental Affairs*, 103rd Cong., 1st Sess. 21 (1993)).

20. *Compare, e.g.*, Petr. Br. at 13 (citing 1987 testimony by then-pending legislation sponsor regarding arrest rates of "illegal aliens"), *with id.* at 19 (citing statistics of number of "aliens" in 1992 who had committed an aggravated felony (presumably, as then quite narrowly defined) and then failed to appear for hearings).

turns to a 1996 study – apparently cited nowhere in the legislative history – purporting to show that fully 90% of immigrants like Respondent abscond. Petr. Br. at 23-25. (citing Office of the Inspector General, U.S. Dep't. of Justice, Inspection Report, Immigration and Naturalization Service Deportation of Aliens After Final Orders Have Been Issued, Rep. No. I-96-03 (Mar. 1996) (hereinafter "OIG Report"). Even a passing look at the OIG Report reveals that the study does not address the question at issue in this case: whether it is reasonable to presume – irrebuttably – that lawful permanent residents pose such a flight risk or danger that they must be detained, for an arbitrary period, until the Government gets around to determining their removability.

The OIG Report found, simply, that 89% of non-detained aliens subject to a final removal order were never deported. This finding does not purport to address, in particular, the flight risk of immigrants subject to Section 1226(c), immigrants who have not yet been issued final orders of removal, immigrants released on bail after a hearing, or lawful permanent residents. At a minimum, as this Court is well aware, "[t]here is a clear difference . . . between facing possible deportation and facing certain deportation." *St. Cyr*, 533 U.S. at 325; *see also Kim v. Ziglar*, 276 F.3d 523, 535 ("[t]he incentives to flee are greater for an alien already ordered removed than for an alien still in removal proceedings"); *Cardoso v. Reno*, 127 F. Supp. 2d 106, 114 (D. Conn. 2001) ("applying a presumption of flight risk to aliens such as Ms. Cardoso is, in fact, counter-intuitive, because as her last opportunity to remain lawfully in the United States, Ms. Cardoso has every incentive to attend the . . . hearing at which her removability will be determined"); General Accounting Office, *Illegal Aliens: Opportunities Exist to Improve the Expedited Removal Process* (Sept. 2000).

Further, the reason given in the OIG Report as to *why* 89% of "non-detained" aliens are never deported after receiving final orders of removal has nothing to do with a finding that these individuals invariably pose a risk of danger or flight. Rather,

the OIG Report concludes that the INS has simply failed to enforce final orders of deportation. The OIG Report repeatedly emphasizes that such factors as the lack of detention and transportation resources, delays in receipt of final orders by the detention and deportation centers, failure to send surrender requests, and failure to pursue or investigate abscondees contributed significantly to the low deportation rate. *Id.* at 5-11; *see also Serrano v. Estrada*, 201 F. Supp. 2d 714, 726 n. 53 ("citing a 'shortage of investigative resources' the report noted that '[n]ondetained aliens who do not comply with a surrender request [we]re rarely pursued actively'") (citations omitted). The OIG Report thus proposes reforms aimed at more "efficient use of detention resources," including "moving more quickly to present surrender notices to aliens after receiving final orders," "delivering surrender notices instead of mailing them," actually "pursuing aliens who fail to appear," "coordinating with other governmental agencies to . . .track[ ] aliens who fail to appear," and "taking aliens into custody… when final orders are issued." *Id.* at 14.

In contrast to the scant evidence supporting mandatory detention for all lawful permanent residents, there is no question that the "actual consequences" of mandatory detention of immigrants like Mr. Kim have been to overwhelm INS detention resources to the breaking point. This outcome is not surprising. As of December 2001, the INS had access to 21,304 beds in federal, state and local facilities to detain legal and illegal immigrants. In Fiscal Year 2000 alone, the INS admitted more than 188,000 aliens into custody for some period of time. *Statement of Joseph Greene, Acting Deputy Executive Associate Commissioner for INS Field Operations, Hearing Before the Subcommittee on Immigration and Claims of the Committee on the Judiciary, House of Representatives*, 107th Cong., 1st Sess., at 18 (Dec. 19, 2001).

Since the INS began asking Congress to reconsider implementing Section 1226(c)'s mandatory detention requirement (which took effect in 1998), the INS has maintained

that it "will be unable to meet the custody requirements of IIRIRA." *Testimony of Doris Meissner, Commissioner, Immigration and Naturalization Service, before the Subcommittee on Immigration Committee on the Judiciary, U.S. Senate* (Sept. 16, 1998). Justice Department studies conducted since then have in fact found resources deeply strained. Indeed, one INS district office reported that it was releasing aliens – not because the local officials wanted to authorize release, but because of lack of detention space. U.S. General Accounting Office, *Illegal Aliens: Opportunities Exist to Improve the Expedited Removal Process*, at 64-65 (Sept. 2000).

Whatever the formal strictures of due process, the system that produces such results – that detains and releases individuals on the basis of whether or not a bed happens to be available, and whether or not their detention actually serves the Government's purposes – is arbitrary at best. Even "removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting). The liberty interests, and accompanying procedural safeguards, afforded to "persons" in this country are surely at least equal to this.

CONCLUSION

For the foregoing reasons, amicus American Bar Association urges that the decision of the Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

ALFRED P. CARLTON, JR.*
President, American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 588-5000

Of Counsel:
JEFFREY L. BLEICH
DEBORAH N. PEARLSTEIN

Attorneys for Amicus Curiae

* *Counsel of Record*

No. 01-1491 (8)

Supreme Court, U.S.
FILED
OCT 28 2002
CLERK

In The
Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

HYUNG JOON KIM,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE CITIZENS AND IMMIGRANTS FOR EQUAL JUSTICE, CAMBODIAN ASSOCIATION OF AMERICA, HMONG NATIONAL DEVELOPMENT, INC., NATIONAL COALITION FOR HAITIAN RIGHTS, NATIONAL COUNCIL OF LA RAZA, ORGANIZATION OF CHINESE AMERICANS, THE SIKH COALITION, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, FLORIDA IMMIGRANT ADVOCACY CENTER, AND NATIONAL IMMIGRATION LAW CENTER, SUPPORTING RESPONDENT

NANCY MORAWETZ
Counsel of Record
WASHINGTON SQUARE LEGAL SERVICES, INC.
161 Avenue of the Americas,
4th Floor
New York, NY 10013
(212) 998-6430

Attorney for Amici

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CA'L COLLECT (402) 342-2831

BEST AVAILABLE COPY

42 pp

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT..... 4

ARGUMENT 5

I. Mandatory detention impinges on the fundamental liberty interests of those detained and their families, imposing burdens on people who do not pose a flight risk or danger and pressuring those detained to abandon meritorious claims to relief..... 5

II. The liberty interests of lawful permanent residents are not diminished by a charge of removability..... 10

A. Some people detained under § 1226(c) are found to be citizens..... 10

B. Some people detained under § 1226(c) show that their convictions have been misclassified and that they are not deportable 12

C. Some people detained under § 1226(c) do not have "convictions" as defined in the Immigration and Nationality Act or are eligible for post-conviction relief in their criminal cases..... 14

D. Some people detained under § 1226(c) qualify for cancellation of removal or relief under former § 1182(c) 16

E. Some people detained under § 1226(c) qualify for relief from persecution 18

TABLE OF CONTENTS – Continued

Page

III. Detention impairs the liberty interest in being able to adequately defend against deportation 20

IV. Mandatory detention under § 1226(c) is lengthy, and hearings assessing the applicability of § 1226(c) do not represent an adequate alternative to individualized bond determinations..... 23

A. Mandatory detention is neither brief nor determinate in duration because adjudication of claims to relief takes considerable time 23

B. Hearings addressing the applicability of § 1226(c) are an inadequate mechanism to redress the statute's broad reach..... 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. INS, No. Civ. 96-147-P-C, 1997 WL 97114 (D. Me. Feb. 27, 1997) 11

Amaye v. Elwood, 01-CV-2177, 2002 WL 1747540 (M.D. Pa. June 17, 2002)..... 24

In re Bahta, 22 I. & N. Dec. 1381 (BIA 2000)..... 26

Baldio v. United States, 172 F. Supp. 2d 1200 (D. Minn. 2001) 24

Baltazar v. Fasano, No. 99-CV-380, slip op. (S.D. Cal. Mar. 25, 1999)..... 24

Belgrave v. Greene, 2000 U.S. Dist. LEXIS 18648 (D. Colo. Dec. 5, 2000)..... 24

In re C-V-T-, 22 I. & N. Dec. 7 (BIA 1998) 22

Chanthanounsy v. Cumberland County Sheriff, 02-CV-71, 2002 WL 1477170 (D. Me. July 9, 2002)..... 24, 29

Chowdhury v. INS, 249 F.3d 970 (9th Cir. 2001) 13

Chukwuezi v. Reno, Civ. A. No. 3: CV-99-2020, 2000 WL 1372883 (M.D. Pa. May 16, 2000)..... 24, 26

In re Devison-Charles, 22 I. & N. Dec. 1362 (BIA 2000)..... 15, 26

Fierro v. Reno, 217 F.3d 1 (1st Cir. 2000) 11

Forbes v. Perryman, No. 02 C 4254, 2002 WL 31236415 (N.D. Ill. Oct. 3, 2002) 18

Gill v. Ashcroft, No. 01 C 9789, 2002 WL 1163729 (N.D. Ill. May 31, 2002) 29

INS v. St. Cyr, 533 U.S. 289 (2001)..... 15, 16, 17, 18, 25

Jordan v. DeJorge, 341 U.S. 223 (1951)..... 13

TABLE OF AUTHORITIES – Continued

Page

In re Joseph, 22 I. & N. Dec. 799 (BIA 1999).....27, 28

Kahn v. Perryman, No. 00 C 3398, 2000 WL 1053962 (N.D. Ill. July 31, 2000).....24

Lopez-Elias v. Reno, 209 F.3d 788 (5th Cir. 2000).....13

In re Lopez-Meza, 22 I. & N. Dec. 1188 (BIA 2000).....26

Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000).....15

Mamedov v. Reno, 00 Civ. 0442, 2000 U.S. Dist. LEXIS 10540 (S.D.N.Y. July 28, 2000).....26

In re Marin, 16 I. & N. Dec. 581, 584 (BIA 1978).....16

Moussa v. INS, 302 F.3d 823 (8th Cir. 2002).....11

Ng v. Demore, No. C-01-20095, slip. op. (N.D. Cal. Apr. 17, 2001).....24

Okeke v. Pasquarell, 80 F. Supp. 2d 635 (W.D. Tex. 2000).....17

In re Olivares-Martinez, 23 I. & N. Dec. 148 (BIA 2001).....26

Peralta-Veras v. Ashcroft, No. CV 02-1840, 2002 WL 1267998 (E.D.N.Y. Mar. 29, 2002).....24

In Re Perez, 22 I. & N. Dec. 1325 (BIA 2000).....26

In re Puente, 22 I. & N. Dec. 1006 (BIA 1999).....26

In re Ramos, 23 I. & N. Dec. 336 (BIA 2002)..... 9

In re Rodriguez-Ruiz, 22 I. & N. Dec. 1378 (BIA 2000).....15, 26

In re Rojas, 23 I. & N. Dec. 117 (BIA 2001).....28

Roman v. Ashcroft, 181 F. Supp. 2d 808 (N.D. Ohio 2002).....26

TABLE OF AUTHORITIES – Continued

Page

Said v. Eddy, 87 F. Supp. 2d 937 (D. Alaska 2000).....11

Serrano v. Estrada, 201 F. Supp. 2d 714 (N.D. Tex. 2002).....7, 24, 26

In re Santos-Lopez, 23 I. & N. Dec. 419 (BIA 2002).....13

In re Small, 23 I. & N. Dec. 448 (BIA 2002).....26

Solorzano-Patlan v. INS, 207 F. 3d 869 (7th Cir. 2000).....12, 21

Steele v. Blackman, 236 F.3d 130 (3d Cir. 2001) 26

Tiv v. Reno, No. 99 C 872, 2000 U.S. Dist. LEXIS 2170 (N.D. Ill. Feb. 23, 2000).....24

In re Torres-Varela, 23 I. & N. Dec. 78 (BIA 2001).....13, 26

Thomas v. Reno, No. 00-3493, slip op. (D.N.J. Oct. 11, 2001).....28

United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001).....13

United States v. Hernandez-Castellanos, 287 F.3d 876 (9th Cir. 2002) 13

United States v. Ponce-Casalez, 212 F. Supp. 2d 42 (D.R.I. 2002).....14

United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001).....13

United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001) 9

United States v. Villanueva-Garcia, 216 F.3d 1085 (9th Cir. 2000) 14

Valansi v. Reno, 278 F.3d 203 (3d Cir. 2002) 6

TABLE OF AUTHORITIES – Continued

Page

Van Eeton v. Beebe, 49 F. Supp. 2d 1186 (D. Or. 1999) 11

Vang v. Ashcroft, 149 F. Supp. 2d 1027 (N.D. Ill. 2001) 13

Wedderburn v. INS, 215 F.3d 795 (7th Cir. 2000) 11

In re West, 22 I. & N. Dec. 1405 (BIA 2000) 6

Williams v. INS, C.A. No. 01-043, 2001 WL 1136099 (D.R.I. Aug. 7, 2001) 25

Yacoub v. Elwood, No. 01-0809, 2002 U.S. Dist. LEXIS 12122 (E.D. Pa. Jan. 14, 2002) 24

In re Yanez-Garcia, 23 I. & N. Dec. 390 (BIA 2002) 27

Yanez v. Holder, 149 F. Supp. 2d 485 (N.D. Ill. 2001) 26

Zadvydas v. Davis, 533 U.S. 687 (2001) 29

STATUTES:

FEDERAL STATUTES

Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*

8 U.S.C. § 1101(a)(20) 10

8 U.S.C. § 1101(a)(43)(A), (G), (K)(i), (M)(i), (Q), (R), (S), (T) 13

8 U.S.C. § 1101(a)(43)(B), (C), (D), (E), (F), (H), (I), (J), (K)(ii), (K)(iii), (L), (M)(ii), (N), (O), (P) 13

8 U.S.C. § 1101(a)(43)(F) and (G) 12

8 U.S.C. § 1101(a)(48)(A) 14, 15

8 U.S.C. § 1158 18

8 U.S.C. § 1182(c) (repealed 1996) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

8 U.S.C. § 1226(c) ..... *passim*

8 U.S.C. § 1227(a)(2)(A)(i), (A)(ii), (A)(iii), (B), (C), (D) 14

8 U.S.C. § 1227(a)(2)(A)(ii) 13

8 U.S.C. § 1227(a)(2)(B)(i) 14

8 U.S.C. § 1229b(a) 16

8 U.S.C. § 1229b(a)(3) 16

8 U.S.C. § 1229a(b)(4)(A) 20

8 U.S.C. § 1231(b)(3) 18, 19

8 U.S.C. § 1401(g) 11

8 U.S.C. § 1431 11

8 U.S.C. § 1432 (repealed 2000) 11

STATE STATUTES

Cal. Penal Code § 1016.5 15

Conn. Gen. Stat. § 54-1j 15

Fla. R. Crim. P. 3.172(c)(8) 15

Mass. Gen. Laws ch. 278, § 29D 15

Ohio Rev. Code § 2943.031 15

Or. Rev. Stat. § 135.385(2)(d) 15

Tex. Crim. Proc. Code Ann. art. 26.13(a)(4) 15

Wash. Rev. Code § 10.40.200 15

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS:

8 C.F.R. § 1.1(p) 10

8 C.F.R. § 3.1(g) 27

8 C.F.R. §§ 208.16-18 18

8 C.F.R. § 240.10(a)(4) 22

OTHER AUTHORITIES:

Elizabeth Amon, *INS Fails to See the Light*, Nat'l L.J., Mar. 5, 2001 at A1 20

Brett Barrouquere, *Seeking a "Second Chance": 32-year U.S. Resident Fights His Deportation*, Advocate (Baton Rouge), Aug. 13, 2001, at 1B 8

Jody A. Benjamin, *'96 Reform Law Lets INS Cast a Wide Net*, Sun-Sentinel, Apr. 22, 2001, at 1A 7, 9

Birth Announcements, Anchorage Daily News, Dec. 24, 1999, at 4C 8

Lisa Demer, *INS Ends Woman's Jail Ordeal*, Anchorage Daily News, Nov. 24, 1999, at 1A 8

Susan Gilmore, *Mother Won't be Deported After All: '92 Conviction Had Left Her in Limbo*, Seattle Times, Aug. 7, 2002, at A1 8

Don Hamilton, *Immigration Judge Decides Against Deporting Ex-Marine*, Oregonian, Sept. 21, 1999, at E1 11

Dave Harmon, *After a Brush with the Law, Some Legal Immigrants Face Deportation*, Austin American-Statesman, Jan. 16, 2000, at A1 7

TABLE OF AUTHORITIES – Continued

Page

INS Detention Facilities, available at www.ins.usdoj.gov/graphics/fieldoffices/detention/INSDetention.htm (last visited Oct. 22, 2002) 20

Immigration and Naturalization Service, Detention Operation Manual: Access to Legal Materials, at 3, Attachment A, Sept. 20, 2000 22

Anthony Lewis, *Is this America?*, N.Y. Times, Sept. 21, 1999, at A29 8

Patrick J. McDonnell, *Report Finds Mixed-Status Citizenship in Many Families*, L.A. Times, June 28, 1999, at B1 4

Man Fights to Stay in U.S. After a Drug Conviction, Roanoke Times & World News, Aug. 5, 2001, at B1 8

Steve Orr, *Local Lock-Up Plays Global Role*, Rochester Democrat and Chronicle, Jul. 21, 2002, at 6A 7

Maro Robbins, *Requests for Bond Denied by Court*, San Antonio Express-News, Jan. 20, 2000 at 3B 17

Julie Sullivan, *Illegal Immigrants are Dumped into a Secretive Prison Network Driven by Ineptness and Severe Immigration Reforms*, Sunday Oregonian, Dec. 10, 2000, at A1 ..... 20, 21

Lynn Waddell, *Court of No Return*, Miami Daily Business Review, Apr. 1, 2002, at A6 7

INTEREST OF *AMICI CURIAE*[1]

Amici are the families affected by the mandatory detention provisions of 8 U.S.C. § 1226(c) (2000), lawyers with experience representing those in detention, and organizations that serve communities affected by mandatory detention policies. Our stories and those of thousands of others similarly situated demonstrate the harshness of § 1226(c) and lay bare the fiction that mandatory detention under § 1226(c) is simply a brief way station on an inevitable path to deportation. A small sampling of these stories is presented throughout this brief.[2]

Citizens and Immigrants for Equal Justice (CIEJ) is a national coalition of over 1,000 families in twenty-nine states whose integrity has been directly threatened by mandatory detention. Our members are the family members of lawful permanent residents who face deportation. Mandatory detention does incalculable injury to our families, separating parents from children and depriving our family members of essential income and emotional support. In many cases, mandatory detention leads our family members to give up hope and agree to permanent exile even though they have valid claims to remain with us in the United States.

The Cambodian Association of America (CAA) provides advocacy, cultural education, and support services to Cambodians in Long Beach, California, the largest

---

[1] This brief is submitted by consent of the parties. It was authored in whole by *amici curiae*. No person or entity other than *amici*, their members, or their counsel, contributed to the costs of preparation and submission of this brief.

[2] *Amici* have lodged documents with the Court substantiating the stories presented in this brief that are not described in reported cases or media accounts. *See* Lodging of *Amici Curiae* CIEJ *et al.* (hereinafter "Lodging").

population of Cambodians in the U.S. Mandatory detention has resulted in members of our community losing access to the basic due process all Americans enjoy. Many Cambodians in Immigration and Naturalization Service (INS) detention signed their orders of removal in order to be released from mandatory detention without fully understanding the implications of that decision.

Hmong National Development, Inc. (HND) is a national nonpartisan, nonprofit organization dedicated to furthering the education of all Hmong, to increasing economic prosperity for the community, and to developing resources that strengthen the role and involvement of Hmong individuals and organizations in shaping the community's future. Hmong facing removal are refugees who escaped persecution and are often devastated at the prospect of returning to the country they fled. Mandatory detention needlessly tears apart Hmong families during these trying proceedings.

The National Coalition for Haitian Rights (NCHR) advocates on behalf of the Haitian community to protect the rights of Haitian immigrants and asylum seekers in the U.S. Among our many concerns are redressing the punitive nature of INS detention policies and the need for full appreciation of human rights conditions in Haiti. Mandatory detention penalizes members of our community who raise valid claims regarding the persecution they would face if deported to Haiti.

The National Council of La Raza (NCLR) is the largest constituency-based national Hispanic civil rights organization in the U.S. NCLR is a nonprofit, nonpartisan umbrella organization for more than 300 local affiliated community-based organizations and has a broader network of 33,000 groups and individuals nationwide. Approximately 40% of the country's 35 million Latinos are foreign-born, and since many Latinos live in mixed-status

families, the vast majority of our nation's Latinos – citizens and noncitizens – are directly affected by immigration policy.

The Organization of Chinese Americans, Inc. (OCA) is a nonprofit, nonpartisan civil rights organization dedicated to ensuring the equality of Chinese Americans, Asian Americans, and all Americans in the U.S. Founded in 1973, OCA currently represents over 10,000 members in fifty chapters and twenty-six college affiliates. OCA has worked to ensure that Asian American immigrants are treated fairly and are accorded the rights guaranteed to them under the Constitution and federal, state and local law.

The Sikh Coalition is a national civil rights organization that works to safeguard the civil and human rights of all citizens and communicate the collective interests of Sikhs to civil society. Many Sikhs in the U.S. are lawful permanent residents who would be subject to mandatory detention during the pendency of removal proceedings. The Sikh Coalition is concerned that these lawful permanent residents would be subjected to detention even though they pose no flight or other risk.

American Immigration Lawyers Association (AILA) is a national association with over 7,000 members throughout the U.S., including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the jurisprudence of immigration law, to facilitate the administration of justice, and to elevate standards of practice among those appearing in a representative capacity in immigration and naturalization matters.

The Florence Immigrant and Refugee Rights Project (Florence Project) is a nonprofit organization that provides free legal assistance to the roughly 1,900 immigrant men, women, and children who are detained by INS on any given day in Arizona. Many of the individuals that

the Florence Project counsels are longtime lawful permanent residents who have extensive family and community ties in the U.S. In the Project's experience, detention is a severe deterrent for individuals when making the decision whether to pursue claims for relief.

The Florida Immigrant Advocacy Center (FIAC) is a nonprofit legal aid organization dedicated to promoting the basic human rights of immigrants. FIAC's attorneys have represented hundreds of lawful permanent residents affected by the mandatory detention provisions of § 1226(c), and have witnessed the devastating impact these provisions have on our nation's longtime immigrants, their U.S. citizen family members, and our communities.

The National Immigration Law Center (NILC) is a nonprofit legal center dedicated to protecting and promoting the rights of low-income immigrants and their family members. NILC conducts trainings, produces legal publications, provides technical assistance to legal assistance organizations, and conducts litigation to promote the rights of low-income immigrants. A major concern of the organization is to ensure the fairness and constitutionality of immigration law enforcement.

SUMMARY OF ARGUMENT

Our loved ones, clients and community members detained under § 1226(c) are lawful permanent residents and often have been for most of their lives. Many of the people most affected by the absence of those detained are U.S. citizens.[3] Mandatory detention results in a loss of

[3] Seventy-five percent of children in immigrant families are U.S. citizens. Patrick J. McDonnell, *Report Finds Mixed-Status Citizenship in Many Families*, L.A. Times, June 28, 1999, at B1.

liberty that is total and severe, often as great as or greater than the punishment imposed for past criminal convictions. The full weight of mandatory detention is brought to bear by a mere preliminary assessment of deportability even though many of those detained ultimately establish that they are not removable as charged or win relief from removal. Detention under § 1226(c) impairs the ability of countless others who may have similarly meritorious claims to obtain counsel and present their cases. Those who concede deportability are prevented from tying up their affairs and making preparations with their families for their departure, to the detriment of the wider community.

Amici know from experience that detention throughout the complex process of determining removability is not the minimal and determinate imposition on liberty that the government claims it to be. Nor are existing mechanisms adequate to prevent the prolonged detention of people who do not in fact present a risk of flight or a danger to their communities. In cases where federal court intervention or other factors have allowed individualized findings to be made, many of those subject to § 1226(c) have shown that they merit release. *Amici* seek a ruling from this Court that each individual be accorded the same opportunity.

ARGUMENT

I. Mandatory detention impinges on the fundamental liberty interests of those detained and their families, imposing burdens on people who do not pose a flight risk or danger and pressuring those detained to abandon meritorious claims to relief

Mandatory detention disrupts every facet of a person's life. Most lawful permanent residents subjected to § 1226(c) have lives firmly established in the U.S. Time

spent in detention tears them away from their families, prevents them from working, running businesses, and attending school, and subjects them to onerous prison conditions. Although immigration charges are civil, those detained suffer a total loss of liberty.

- **Elanith Valansi** endured nearly a year of mandatory detention under § 1226(c) before the Third Circuit Court of Appeals held that a single conviction for embezzlement was not a deportable offense. The day after she was taken into INS custody, her father, age fifty-six, died of a heart attack. She was only permitted to attend the funeral in handcuffs while guarded by seven INS agents wearing bulletproof vests, was kept in a separate room from her father's casket, and was prohibited from participating in the ritual throwing of dirt on the coffin. Family and friends were forbidden from coming within fifty feet of her to offer condolences, and the rabbi was prevented from approaching her to say a prayer. Ms. Valansi, born in Israel, arrived in the U.S. in 1974 when she was six weeks old and became a lawful permanent resident in 1990. Her parents, siblings and step-siblings are U.S. citizens or lawful permanent residents.[4]

Mandatory detention imposes this deprivation of liberty on people who have already shown that they are not dangerous. Many people held under § 1226(c) were never incarcerated[5] or served only short sentences. For example, Ansar Mahmood pled guilty to harboring an alien as a result of helping his sister's friends rent an apartment. He was sentenced to no jail time. However, as

[4] *Valansi v. Reno*, 278 F.3d 203, 205, 217 (3d Cir. 2002); Lodging at L-1.

[5] The Board of Immigration Appeals (BIA) has specifically noted that "release" under § 1226(c) can include release from a physical restraint other than a term of imprisonment, such as an arrest. *See In re West*, 22 I. & N. Dec. 1405, 1407-08, 1410 (BIA 2000).

of July, he had been held in INS mandatory detention for seven months. *See* Steve Orr, *Local Lock-Up Plays Global Role*, Rochester Democrat and Chronicle, July 21, 2002, at 6A.[6] Others have been released after criminal trial and permitted to surrender themselves to serve their sentences, or have otherwise proven themselves not to be flight risks. At his third hearing before an immigration judge, Dhonovan Serrano was informed that he should have been taken into mandatory detention upon release from criminal incarceration. The judge gave him three days to make arrangements, and Mr. Serrano complied, surrendering himself to INS. Prior to his surrender, he had driven from his home in Arizona to Dallas, Texas three times to attend removal hearings. *Serrano v. Estrada*, 201 F. Supp. 2d 714, 716 (N.D. Tex. 2002).[7]

Individuals and families suffer acutely from the separation imposed by mandatory detention. Many are taken into INS custody months or years after serving their sentences, resulting in massive disruption to their and

[6] *See also* Lynn Waddell, *Court of No Return*, Miami Daily Business Review, Apr. 1, 2002, at A6 (detainee served ten days in jail for shoplifting two flashlight batteries and spent at least three months in mandatory detention); Jody A. Benjamin, *'96 Reform Law Lets INS Cast a Wide Net*, Sun-Sentinel, Apr. 22, 2001, at 1A (Peterson Polidor served seventy-six days for theft and burglary but subsequently spent at least nine months in mandatory detention); Dave Harmon, *After a Brush with the Law, Some Legal Immigrants Face Deportation*, Austin American-Statesman, Jan. 16, 2000, at A1 (Jason Fransella was sentenced to three years probation in 1999 but spent at least four months in mandatory detention).

[7] *See also* Lodging at L-1 (after posting bail, Elanith Valansi was permitted to remain at liberty throughout her criminal proceedings and to surrender herself to serve her sentence); *id.* at L-2 (Jose Martinez remained at liberty on bail during his criminal case and once sentenced, was permitted to surrender himself into custody).

their family members' lives.[8] Further, INS can move detained individuals hundreds or thousands of miles away from their homes.

- Even though **Hawa Said** was pregnant, INS, after taking her into mandatory detention, transferred her to a detention center in San Diego, 2,427 miles away from her home, her family, and her attorney. INS moved her back to Alaska only after being ordered to do so by a federal judge. Throughout her removal proceedings, Ms. Said asserted that she was a U.S. citizen, a claim subsequently recognized by the State Department. Despite this assertion, she spent six months in § 1226(c) detention for a drug conviction for which she had served thirty days. She gave birth just over a month after the conclusion of her proceedings. Ms. Said, born in Yemen, came to the U.S. in 1978, when she was one year old. Her father and two children are U.S. citizens.[9]

---

[8] Susan Gilmore, *Mother Won't be Deported After All: '92 Conviction Had Left Her in Limbo*, Seattle Times, Aug. 7, 2002, at A1 (resident of Washington, a single mother of four citizen children, had been sentenced to probation in 1992 and was subsequently held in mandatory detention in Louisiana for seven months. She was ultimately granted relief under former 8 U.S.C. § 1182(c)); Benjamin, *supra* (Donovan Williams held in mandatory detention for at least sixteen months for a 1986 conviction for which he served eight months. His long-term girlfriend had to work extra nursing shifts while taking care of their four U.S. citizen children).

[9] *Birth Announcements*, Anchorage Daily News, Dec. 24, 1999, at 4C; Lisa Demer, *INS Ends Woman's Jail Ordeal*, Anchorage Daily News, Nov. 24, 1999, at 1A; Anthony Lewis, *Is this America?*, N.Y. Times, Sept. 21, 1999, at A29; *see also* Brett Barrouquere, *Seeking a "Second Chance": 32-year U.S. Resident Fights His Deportation*, Advocate (Baton Rouge), Aug. 13, 2001, at 1B (describing case of Robert Anthony Levy, sent by INS in February 1999 from Chicago to Pointe Coupee Parish jail in Louisiana, where he has seen his U.S. citizen wife and three U.S. citizen children only twice in the past two years because of the distance from Chicago); *Man Fights to Stay in U.S. After a Drug Conviction: Man Wants to Avoid Deportation Back to Iran*, Roanoke

(Continued on following page)

The combined weight of long separation from family, loss of income, and the prospect of extended confinement exerts enormous pressures on those mandatorily detained to forego or abandon meritorious defenses to removal. In 1999 and 2000, *amicus* the Florence Project identified twenty-four cases of detained clients who could contest their removability pursuant to a conviction for driving under the influence (DUI) under Arizona or California law. The controlling legal issue was on appeal from the Board of Immigration Appeals (BIA) to the Ninth Circuit and other circuit courts around the country. Faced with the prospect of mandatory detention during the pendency of their appeals, only fourteen of the eligible clients felt able to press their claims before the BIA. Of these, five abandoned their appeals before the BIA gave decisions in their cases. Seven more gave up before the circuit court ruled. Only two clients remained in detention to benefit from the Ninth Circuit's decision in *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) holding that their DUI convictions were not aggravated felonies for immigration purposes. Ultimately, the BIA acceded to the mounting consensus among the courts of appeals, reversing its prior precedent on DUI convictions. *In re Ramos*, 23 I. & N. Dec. 336 (BIA 2002). But this was all too late for the lawful permanent residents unable to bear continued detention.[10]

Times & World News, Aug. 5, 2001, at B1 (reporting on Majid Khoshghad, a resident of Virginia transported to an INS detention facility in Oakdale, Louisiana in 1999. A district court judge later ordered him transferred to a local jail in Virginia so that he could better challenge his underlying conviction); Benjamin, *supra* (noting Donovan Williams' transfer from Florida's Krome Detention Center to Clay County Jail, 320 miles and a six hour drive from his home).

[10] *See also* Lodging at L-3 (affidavit of law school clinical professor who has had many clients abandon meritorious claims rather than face protracted detention).

II. The liberty interests of lawful permanent residents are not diminished by a charge of removability

The government insists that persons subject to mandatory detention under § 1226(c) have committed crimes that "terminate their entitlement to remain in the United States," Pet. Br. at 11, and therefore have no significant liberty interest in being free from detention. But whether a person will be stripped of lawful permanent resident status and removed is determined at the end of proceedings, not at the outset. 8 U.S.C. § 1101(a)(20) (2000); 8 C.F.R. § 1.1(p) (2002). As the experiences of our family and community members and clients make clear, it is frequently impossible to determine whether someone is removable without careful and thorough adjudication in removal proceedings or in the federal courts. Nonetheless, persons charged as removable under § 1226(c) remain locked up without any opportunity to show that they are not a danger or a flight risk.

A. Some people detained under § 1226(c) are found to be citizens

Some of those charged with removability by INS demonstrate in proceedings that they are U.S. citizens, and therefore not deportable. However, while proving their claims, these U.S. citizens can languish in mandatory detention for months or years.

- **Joe Van Eeten**, a decorated Vietnam veteran, asserted throughout his proceedings that he had been naturalized in a ceremony at Camp Pendleton, California in 1968, just before being sent to Vietnam. The immigration judge eventually affirmed his claim, and the BIA rejected the government's appeal. Mr. Van Eeten spent nearly five months in § 1226(c) detention before a district court judge ordered that he be provided with a bond hearing. Had the court not struck down § 1226(c), Mr. Van Eeten would have been detained while he pursued his case before the immigration judge and defended against the government's appeal. Born a citizen of the Netherlands, he came to the U.S. as a lawful permanent resident in 1961 and joined the Marines in 1967.[11]

For persons not born in the U.S., proving U.S. citizenship is a legally and factually intensive process, requiring documentation of their own and their families' history over many years. As Mr. Van Eeten's case illustrates, questions can arise concerning the naturalization process itself. In addition, whether a person derived citizenship from the naturalization of a parent under 8 U.S.C. § 1431 or former § 1432 (repealed 2000) depends on issues such as what constitutes legal custody, *see Fierro v. Reno*, 217 F.3d 1, 4 (1st Cir. 2000), legal separation, *see Moussa v. INS*, 302 F.3d 823, 824 (8th Cir. 2002), or divorce, *see Said v. Eddy*, 87 F. Supp. 2d 937, 938 (D. Alaska 2000). Acquisition of citizenship at birth under 8 U.S.C. § 1401(g) may revolve around questions of legitimation, requiring the analysis of state laws or laws of other countries. *See, e.g., Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000) (noting possible effect of Jamaican law of child custody on citizenship claim); *Alexander v. INS*, No. Civ. 96-147-P-C, 1997 WL 97114, at *1-2 (D. Me. Feb. 27, 1997) (whether petitioner had become a citizen when his father naturalized determined by Maine legitimation law). None of these legal and factual questions can be resolved by looking at the charging document.

---

[11] *See Van Eeton v. Beebe*, 49 F. Supp. 2d 1186 (D. Or. 1999); Lodging at L-4; Don Hamilton, *Immigration Judge Decides Against Deporting Ex-Marine*, Oregonian, Sept. 21, 1999, at E1.

B. Some people detained under § 1226(c) show that their convictions have been misclassified and that they are not deportable

It is often less than clear how a person's criminal convictions should be classified under immigration law. These classifications depend on complex and fact-sensitive interactions between immigration law, federal criminal statutes, and the criminal statutes of each of the fifty states. The result is that many lawful permanent residents are able to demonstrate during the course of their removal hearings that their crimes do not make them deportable.

- INS charged **Mario Solorzano-Patlan**, a lawful resident of thirteen years and father of a U.S. citizen child, as an aggravated felon based on a guilty plea to charges of entering an automobile with intent to commit theft.[12] He was ordered removed, and nine months later his appeal of the aggravated felony finding was dismissed by the BIA, which found that the burglary statute under which he was convicted "falls easily within" the definition of an aggravated felony at 8 U.S.C. § 1101(a)(43)(F) and (G). Seven months later, the Seventh Circuit found that it met neither definition, admonishing that "the INS . . . would be well advised to look at the charging papers in order to ensure that [basic elements of the relevant federal definition] are satisfied before it initiates the serious ramifications of removal proceedings based on an alleged 'burglary offense.'"[13]

[12] Mr. Solorzano-Patlan had been recommended to participate in an alternative incarceration program ("boot camp") but could not because INS had placed a detainer on him with the state authorities in anticipation of his detention under § 1226(c).

[13] *Solorzano-Patlan v. INS*, 207 F.3d 869, 875 (7th Cir. 2000).

Similarly, Elanith Valansi, whose case is discussed *supra* p. 6, was charged as an aggravated felon for an embezzling offense but ultimately found not removable by the Third Circuit, nearly a year after INS had detained her. Classification of given crimes as aggravated felonies is a particularly unsettled area of immigration law, requiring comparison of widely varying state statutes to federal definitions and often requiring an examination of analogy to federal criminal offenses.[14] The same uncertainty hangs over those charged as having been convicted of a "crime involving moral turpitude" (CIMT) under 8 U.S.C. § 1227(a)(2)(A)(ii), a term with no statutory definition. *See Jordan v. DeJorge*, 341 U.S. 223 (1951). The INS' initial determinations about whether a given crime meets either of these definitions are often overturned by immigration courts and the federal courts.[15]

[14] *See, e.g.*, 8 U.S.C. § 1101(a)(43)(B), (C), (D), (E), (F), (H), (I), (J), (K)(ii), (K)(iii), (L), (M)(ii), (N), (O), (P) (2000) (incorporating by reference various sections of federal criminal code or criminal offenses under Immigration and Nationality Act); 8 U.S.C. § 1101(a)(43)(A), (G), (K)(i), (M)(i), (Q), (R), (S), (T) (2000) (requiring comparison of state or federal crime to definition in statute).

[15] *See, e.g.*, *Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001) (laundering conviction under 18 U.S.C. § 1956(a)(1)(B)(i) not an aggravated felony); *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (marijuana conviction under Cal. Health & Safety Code § 11360(a) not an aggravated felony); *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000) (burglary of a vehicle conviction under Tex. Penal Code § 30.04(a) not an aggravated felony); *Vang v. Ashcroft*, 149 F. Supp. 2d 1027 (N.D. Ill. 2001) (operating a vehicle without an owner's consent not aggravated felony); *In re Santos-Lopez*, 23 I. & N. Dec. 419 (BIA 2002) (en banc) (two Class B misdemeanor marijuana possession convictions under Tex. Penal Code § 481.121 are not an aggravated felony); *In re Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001) (Arizona aggravated DUI under Ariz. Rev. Stat. § 28-692(A)(1) and § 28-697(A)(2), (D), (F), (H)(1), (I) and (J) not a crime involving moral turpitude); *see also United States v. Hernandez-Castellanos*, 287 F.3d 876 (9th Cir. 2002) (felony endangerment conviction under Ariz. Rev. Stat. § 13-1201 not an aggravated felony); *United States v.*

(Continued on following page)

C. Some people detained under § 1226(c) do not have "convictions" as defined in the Immigration and Nationality Act or are eligible for post-conviction relief in their criminal cases

Most grounds of deportability that trigger mandatory detention under § 1226(c) require that the respondent have been "convicted" of a "crime." *See* 8 U.S.C. § 1227(a)(2)(A)(i), (A)(ii), (A)(iii), (B), (C), (D) (2000). The Immigration and Nationality Act defines "conviction" as a formal judgment of guilt entered by a court, or a judicial or jury finding of guilt or admission of facts sufficient to warrant such a finding combined with some form of penalty or restraint. 8 U.S.C. § 1101(a)(48)(A) (2000). It is sometimes unclear at the outset of proceedings whether a given state criminal disposition meets this definition.

- **Miguel Devison-Charles** pled guilty to attempted possession of a controlled substance in the third degree in 1992, when he was nineteen years old. He was adjudicated a youthful offender under Article 720 of the New York Criminal Procedure Law and received a sentence of probation. In 1998, after missing an appointment with his probation officer, he was sentenced to one year of imprisonment. INS subsequently detained him and charged him as removable under 8 U.S.C. § 1227(a)(2)(B)(i), as an alien convicted of a controlled substance violation. Mr. Devison-Charles spent over eleven months detained in Oakdale, Louisiana before the BIA found that his resentencing on a youthful offender disposition did not fall within the definition of "conviction" at 8 U.S.C. § 1101(a)(48)(A).[16]

Chapa-Garza, 243 F.3d 921 (5th Cir. 2001) (felony DUI conviction under Tex. Penal Code § 49.09 not an aggravated felony); *United States v. Villanueva-Garcia*, 216 F.3d 1085 (9th Cir. 2000) (discharge of a firearm with gross negligence conviction under Cal. Penal Code § 246.3 not an aggravated felony); *United States v. Ponce-Casalez*, 212 F. Supp. 2d 42 (D.R.I. 2002) (simple assault not an aggravated felony).

In other cases, lawful permanent residents have grounds for relief based on post-conviction remedies. As this Court recently noted in *INS v. St. Cyr*, 533 U.S. 289, 322 (2001), the immigration consequences of a guilty plea are often central to an informed decision. Some states have statutes requiring criminal court judges to advise defendants that they may face removal if they are not citizens; the criminal court will sometimes vacate a plea entered in violation of these requirements.[17] When a conviction is vacated by a state court for legal error, it no longer remains a valid ground for removal. *See, e.g.*, *In re Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (BIA 2000).

- **Nishyar Abdullaciz Farok**, a refugee from northern Iraq, pled guilty to delivery of a controlled substance at the age of sixteen. After Mr. Farok was placed in removal proceedings, his lawyer presented prosecutors with evidence that Mr. Farok's conduct and his plea took place under threat of serious physical violence from two men who were ten years his senior. The prosecutors agreed to vacatur of the guilty plea on the ground that it was not voluntary and the charges were dismissed by the criminal court. Mr. Farok's removal case was subsequently dismissed.

[16] *In re Devison-Charles*, 22 I. & N. Dec. 1362 (BIA 2000); *see also Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (no conviction for purposes of immigration law where first possession or attempted possession offenses under Idaho and Arizona laws were expunged).

[17] *See* Cal. Penal Code § 1016.5; Conn. Gen. Stat. § 54-1j; Fla. R. Crim. P. 3.172(c)(8); Mass. Gen. Laws ch. 278, § 29D; Ohio Rev. Code § 2943.031; Or. Rev. Stat. § 135.385(2)(d); Tex. Crim. Proc. Code Ann. art. 26.13(a)(4); Wash. Rev. Code § 10.40.200.

Meanwhile, he endured seven months of mandatory detention.[18]

D. Some people detained under § 1226(c) qualify for cancellation of removal or relief under former § 1182(c)

Many of those who are detained under § 1226(c) qualify for cancellation of removal under 8 U.S.C. § 1229b(a), a form of relief granted to lawful residents who have been in that status for at least five years and who have resided continuously in the U.S. for at least seven years. From among the six criminal removal grounds triggering mandatory detention under § 1226(c), only one – aggravated felonies – categorically bars cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3) (2000).

The government asserts that "a removable alien who is detained while the [immigration judge] consider[s] his application for discretionary relief is properly treated as removable unless and until a decision to award discretionary relief is made." Pet. Br. at 27. As noted *supra* p. 10, however, lawful permanent resident status does not terminate until and unless an administratively final order of removal has been entered. Given the breadth of the categories of offenses that can trigger removal proceedings, discretionary relief remains a vital safeguard against removal when, on balance, deporting the respondent would not be in the country's best interests. *St. Cyr*, 533 U.S. at 295 ("The extension of § [1182(c)] relief to the deportation context has had great practical importance, because deportable offenses have historically been defined broadly."); *In re Marin*, 16 I. & N. Dec. 581, 584 (BIA

[18] Lodging at L-5.

1978). Many of our clients and loved ones are forced to seek this relief while detained for long periods.

- **Joseph Okeke**, a Nigerian citizen who came to the U.S. as an infant, was convicted of a single offense of possession of less than one ounce of cocaine in 1999, at the age of nineteen, and served a six-month sentence. He was then transferred to INS custody and held under § 1226(c). An outstanding high school athlete who had acceptance letters from three colleges and no other criminal history, Mr. Okeke won cancellation of removal in December 1999, after six months of INS detention. INS waived any appeal of this determination, and he was released the next day. His attorney commented at the time that "[h]e just sat there for six months for no reason."[19]

Even individuals properly classified as convicted of an aggravated felony may qualify for relief from removal under former 8 U.S.C. § 1182(c) (repealed 1996) under this Court's ruling in *St. Cyr*. Contrary to the government's assertions, *see* Pet. Br. at 28, many of those currently detained pursuant to § 1226(c) may still avail themselves of the right to seek this form of relief because they came into INS custody well after the date of their conviction and any sentence of probation or imprisonment.

- In 1996 **Oscar Olguin-Ruiz** was convicted of a controlled substance violation after becoming

[19] *See Okeke v. Pasquarell*, 80 F. Supp. 2d 635 (W.D. Tex. 2000); Maro Robbins, *Requests for Bond Denied by Court*, San Antonio Express-News, Jan. 20, 2000, at 3B; Lodging at L-6; *see also, e.g.*, Lodging at L-7 (case of Kris Wiboontum, granted cancellation of removal nearly four months after the judge denied bond under § 1226(c)); *id.* at L-8 (case of Jose Luis Figueroa, granted cancellation after five months of mandatory detention); *id.* at L-10 (case of Juan Manuel Mireles Meza, granted cancellation four months after the judge denied bond pursuant to § 1226(c)).

addicted to painkillers following a back injury. He was sentenced to three years deferred adjudication and served no time. However, in August 2001, due to a misunderstanding with his probation officer, later resolved in his favor, he was taken into § 1226(c) detention. Under *St. Cyr*, he was eligible to apply for § 1182(c) relief, which he ultimately won. Nonetheless, he was mandatorily detained for more than nine months, without any opportunity to demonstrate that he presented neither a danger nor a flight risk. Mr. Olguin-Ruiz, born in Mexico, has been a lawful permanent resident since 1980. He has six U.S. citizen children and four U.S. citizen grandchildren.[20]

E. Some people detained under § 1226(c) qualify for relief from persecution

The government is dismissive of the fact that many people detained under § 1226(c) face persecution in their countries of origin, making them eligible for relief. *See* Pet. Br. at 29-30. There are three separate types of relief available: asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3), and, for those who face torture, relief under United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, *see* 8 C.F.R. §§ 208.16-18 (2002). Many of our family and community members and clients have sought and won this relief while mandatorily detained under § 1226(c).

[20] Lodging at L-11; *see also Forbes v. Perryman*, No. 02 C 4254, 2002 WL 31236415, at *4 (N.D. Ill. Oct. 3, 2002) (noting petitioner's eligibility to apply for relief under § 1182(c) and denying INS' motion to dismiss petitioner's writ of habeas corpus); Lodging at L-12 (ordering petitioner's removal proceedings reopened to allow him to apply for a § 1182(c) waiver).

- **M.L.**, a client of *amicus* FIAC and citizen of Haiti, came to the U.S. as a lawful permanent resident in 1978 at the age of twenty-eight. She has five children, four of whom are U.S. citizens. Convicted of a cocaine charge and sentenced to six months in June 2000, she was released a month early for good behavior but was held and transferred to INS custody. Over seven months later an immigration judge granted Ms. L withholding of removal under § 1231(b)(3). The judge credited oral testimony, press accounts, and State Department reports of other females deported to Haiti from the U.S. who were immediately imprisoned and severely mistreated as what Haitians refer to as "imported criminals." INS did not appeal from the judge's decision, and Ms. L was subsequently released under an order of supervision. She is again living with her family, required to report once annually to INS. In total, Ms. L spent over 235 days detained.
- **Tou Ko Vue**, a Hmong born in Laos, spent nearly twenty months in detention vindicating his right to remain in the U.S. even though the government agreed from the beginning that he could not be removed to Laos. He immigrated to the U.S. as a refugee with his parents in 1979, when he was only five months old. His mother and older sister are lawful permanent residents, and he has ten younger U.S. citizen siblings. His father was shot and killed in 1995, when Mr. Vue was seventeen. In June 1999, INS placed Mr. Vue in removal proceedings and detained him, charging him as an aggravated felon based on a conviction for joyriding. Recognizing the situation of Hmong refugees, INS did not oppose an award of withholding of removal, and the judge granted withholding. Mr. Vue then appealed the judge's determination that he was an aggravated felon ineligible for asylum or cancellation of removal. He won this appeal and the case was remanded for consideration of these applications. On remand, INS did not oppose a grant of asylum, but because of the postponement of several hearings by the immigration

court, this relief was not granted until October 27, 2000.[21]

III. Detention impairs the liberty interest in being able to adequately defend against deportation

INS frequently charges persons as falling within § 1226(c) who could successfully refute these allegations or demonstrate eligibility for relief. As our loved ones, community members, and clients have found, however, mandatory detention severely impairs their ability to respond effectively to INS charges.

Mandatory detention directly impacts a person's ability to retain counsel. Approximately ninety percent of INS detainees go through proceedings without representation. Elizabeth Amon, *INS Fails to See the Light*, Nat'l L.J., Mar. 5, 2001, at A1. The detention facilities INS utilizes are not necessarily located in areas with lawyers willing and qualified to represent persons in detention. In addition to the eighteen INS run or contracted detention facilities, INS utilizes approximately 1,940 state prisons and county jails spread throughout the country to house over fifty percent of INS detainees.[22] Detention also prevents detainees from earning an income, creating further complications to retaining legal counsel. *See* 8 U.S.C. § 1229a(b)(4)(A) (2000) (respondents in removal proceedings have "the privilege of being represented, at no expense to the Government"). This translates into forced reliance on the scarce resources of the few public interest

[21] Lodging at L-13 (M.L.) *id.* at L-14 (Vue).

[22] *See* Julie Sullivan, *Illegal Immigrants are Dumped into a Secretive Prison Network Driven by Ineptness and Severe Immigration Reforms*, Sunday Oregonian, Dec. 10, 2000, at A1; *INS Detention Facilities*, *available at* www.ins.usdoj.gov/graphics/fieldoffices/detention/INSDetention.htm (last visited Oct. 22, 2002).

organizations and pro bono attorneys representing immigrants in detention for criminal offenses. But most detention facilities are not located near such organizations or attorneys, and those that do exist are minimal in comparison to the need. In addition, INS' practice of moving people from one facility to another, even in the midst of proceedings, can mean the loss of counsel for those able to retain a lawyer initially.

- **Max Ogando**, who is deaf, is only able to communicate in Spanish sign language. Despite the fact that he had free counsel and a Spanish sign language interpreter in New York, INS transferred Mr. Ogando to Etowah County Jail in Alabama. Because his lawyer was unable to travel the long distance to his hearing, Mr. Ogando was forced to appear in court without counsel. The immigration judge ordered him deported, a decision that has been appealed. When asked by a journalist about his case, the INS spokeswoman said, "We move people around to where we have the space." Mr. Ogando was taken into § 1226(c) detention after serving a one-year sentence for assault, a misdemeanor under New York law.[23]

Proving that one is not removable frequently involves complex legal analysis. For example, determining whether a crime is a removable offense involves comparing and contrasting state and federal statutes and parsing statutory provisions into their various subparts. In the case of Mr. Solorzano-Patlan, discussed *supra* p. 12, the Seventh Circuit analyzed his burglary conviction by comparing the particular provision in the Illinois statute to which he pled guilty with a generic definition of burglary, and criticized the immigration judge for only looking at the title of the state statute, rather than the particular characteristics of the statutory offense. *Solorzano-Patlan*, 207 F.3d at 872. Citizenship claims can involve examining state civil laws

[23] Sullivan, *supra*.

and the laws of foreign countries regarding legitimation procedures, legal separation, divorce, and custody. In Ms. Said's case, discussed *supra* p. 8, citizenship turned solely on whether her parents were divorced according to Yemeni law. Given this complexity, those without lawyers are acutely hampered in their ability to protect their status. The limited[24] legal resources available to detainees proceeding pro se cannot begin to compensate for the lack of access to counsel.

Applications for relief are also factually complex, requiring both extensive documentation and witnesses. Mandatory detention interferes with a person's ability to obtain either. Winning cancellation of removal or § 1182(c) relief depends heavily on one's ability to present sufficient positive equities, including family ties, length of time in the U.S., hardship should deportation occur, service in this country's Armed Forces, employment history, property or business ties, evidence of value and service to the community, proof of genuine rehabilitation, and other evidence attesting to one's good character, such as affidavits from family, friends, and community representatives. *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998). Making this showing entails contacting a variety of administrative agencies, private employers, friends, and family members in order to obtain letters, records, affidavits, and other documents. In addition, applicants must sift through the papers, receipts, and records that have accumulated over many years. Respondents in removal proceedings have a right to present evidence on their behalf, 8 C.F.R. § 240.10(a)(4) (2002), but when they are detained, particularly if the

[24] INS standards permit facilities to limit detainees' access to legal materials to a mere five hours per week, and do not require facilities to provide state civil or criminal laws, civil laws of foreign countries, or reported decisions of federal district and appellate courts. *See* Immigration and Naturalization Service, Detention Operation Manual: Access to Legal Materials, at 3, Attachment A, Sept. 20, 2000.

facility is far from their family and community, applicants may be unable to exercise this right.

- **H.N.**, a California resident and citizen of Colombia, was detained by INS after serving time for a violation of probation on a drug possession offense and qualified to seek cancellation of removal. But he was soon transferred to a detention facility in rural Arizona, one hour's drive from an airport and inaccessible by public transportation. The immigration judge denied his cancellation application, finding that Mr. N had "not submitted any documentation to show his employment history but [merely] stated his employment history in his application along with the fact that he says he filed tax returns for a number of years in the United States." The judge also noted the absence of family members testifying on Mr. N's behalf. Because he was detained, Mr. N had been unable to obtain letters and other documentation of his work and tax history. Further, Mr. N's family could not afford plane tickets to attend the proceedings. He appealed to the BIA, which found that the immigration judge had erred and ordered a rehearing, and on remand the judge granted cancellation. Mr. N spent over eleven months in mandatory detention.[25]

IV. Mandatory detention under § 1226(c) is lengthy, and hearings assessing the applicability of § 1226(c) do not represent an adequate alternative to individualized bond determinations

A. Mandatory detention is neither brief nor determinate in duration because adjudication of claims to relief takes considerable time

The government argues that mandatory detention under § 1226(c) is not "indefinite" because it applies only during the pendency of removal proceedings. Pet. Br. at

[25] Lodging at L-15.

40. The government further argues that this detention is a minimal imposition because removal proceedings before immigration judges are completed in an average time of forty-seven days and a median time of thirty days. *See id.* at 39. Any period of detention under § 1226(c) is a total loss of liberty unjustified by a finding of the individual's danger to the community or flight risk. But the statistics are also misleading, presenting averages that are by no means typical of a case where a detained respondent seeks relief from deportation or contests removability. In such cases, proceedings before the immigration judge may stretch into the hundreds of days. *See, e.g.*, *Amaye v. Elwood*, 01-CV-2177, 2002 WL 1747540 (M.D. Pa. June 17, 2002) (proceedings before immigration judge lasted 276 days).[26] The cases discussed in Part II *supra* demonstrate that removal proceedings can be extremely complex and that vindication of meritorious claims necessarily takes time. Detention under § 1226(c) is neither as short nor as determinate in duration as the government alleges. *See* Pet. Br. at 39-40.

INS' policy of moving those detained under § 1226(c) often delays the beginning of removal proceedings. Even

[26] *See, e.g.*, *Chanthanounsy v. Cumberland County Sheriff*, 02-CV-71, 2002 WL 1477170 (D. Me. July 9, 2002) (proceedings before IJ concluded 140 days after respondent detained); *Serrano v. Estrada*, 201 F. Supp. 2d 714 (N.D. Tex. 2002) (109 days); *Peralta-Veras v. Ashcroft*, No. CV 02-1840, 2002 WL 1267998 (E.D.N.Y. Mar. 29, 2002) (123 days); *Yacoub v. Elwood*, No. 01-0809, 2002 U.S. Dist. LEXIS 12122 (E.D. Pa. Jan. 14, 2002) (118 days); *Baldio v. United States*, 172 F. Supp. 2d 1200 (D. Minn. 2001) (149 days); *Ng v. Demore*, No. C-01-20095, slip op. (N.D. Cal. Apr. 17, 2001) (296 days); *Belgrave v. Greene*, Civ. Action No. 00-B-1523, 2000 U.S. Dist. LEXIS 18648 (D. Colo. Dec. 5, 2000) (over 240 days); *Kahn v. Perryman*, No. 00 C 3398, 2000 WL 1053962 (N.D. Ill. July 31, 2000) (over 143 days); *Chukwuezi v. Reno*, Civ. A. No. 3: CV-99-2020, 2000 WL 1372883 (M.D. Pa. May 16, 2000) (140 days); *Tiv v. Reno*, No. 99 C 872, 2000 U.S. Dist. LEXIS 2170 (N.D. Ill. Feb. 23, 2000) (142 days); *Baltazar v. Fasano*, No. 99-CV-380, slip op. (S.D. Cal. Mar. 25, 1999) (114 days).

where a detainee is held in one place, proceedings before the immigration judge take considerable time. Where removal is contested, immigration proceedings have multiple stages: pleadings at which the respondent concedes to or challenges the factual allegations in the charging document, judicial findings on removability, submission of applications for relief, and adjudication of those claims. Most of the preliminary stages are conducted at separate "master calendar" hearings that can be days or months apart.

- **Hoang Minh Ly** came to the U.S. from Vietnam in 1986. With his brother, who is also a lawful permanent resident, he owns and operates two nail salons in Cleveland, Ohio. Placed in removal for two convictions for bank fraud for which he received sentences of four and eight months respectively, he was detained in Dayton, Ohio at the end of April 1999. His first two master calendar hearings were conducted in Cincinnati, fifty miles away. He was then transferred to North Royalton, Ohio and his case was moved to the immigration court in Cleveland for two further hearings; his fourth master calendar was held in his absence because the INS failed to transport him from the county jail where he was detained. In all, his proceedings before the immigration judge had gone on for seventeen months before a federal district court ordered a bond hearing. Mr. Ly's claim for relief under § 1182(c) under this Court's ruling in *St. Cyr* remains pending before the immigration court.[27]

Appeal by either party to the BIA extends mandatory detention for many additional months. *See Williams v. INS*, C.A. No. 01-043, 2001 WL 1136099, at *1 (D.R.I. Aug. 7, 2001) (appeal pending before the BIA for over twenty

[27] Lodging at L-16.

months).[28] In addition, mandatory detention continues simply on the basis of the government's notice of appeal to the BIA, even though INS may subsequently decline to prosecute.[29]

B. Hearings addressing the applicability of § 1226(c) are an inadequate mechanism to redress the statute's broad reach

The government contends that § 1226(c) contains adequate procedural safeguards because individuals detained under § 1226(c) can seek a hearing on whether

[28] The government asserts that BIA appeals are disposed in a median time of 114 days and an average time of approximately four months. Pet. Br. at 40. In the experience of *amici*, appeals which are not quickly dismissed for procedural default typically take far longer than this average. *See, e.g.*, *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001) (appeal pending before the BIA for over twelve months); *Serrano*, 201 F. Supp. 2d 714 (N.D. Tex. 2002) (over seven months); *Roman v. Ashcroft*, 181 F. Supp. 2d 808 (N.D. Ohio 2002) (over nine months); *Yanez v. Holder*, 149 F. Supp. 2d 485 (N.D. Ill. 2001) (over sixteen months); *Mamedov v. Reno*, 00 Civ. 0442, 2000 U.S. Dist. LEXIS 10540 (S.D.N.Y. July 28, 2000) (at least seven months); *Chukwuezi*, 2000 WL 1372883, at *1 (at least seven months); *In re Small*, 23 I. & N. Dec. 448 (BIA 2002) (over eight months); *In re Olivares-Martinez*, 23 I. & N. Dec. 148 (BIA 2001) (over thirteen months); *In re Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001) (over fourteen months); *In re Bahta*, 22 I. & N. Dec. 1381 (BIA 2000) (over fifteen months); *In re Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (BIA 2000) (over ten months); *In re Devison-Charles*, 22 I. & N. Dec. 1362 (BIA 2000) (over eleven months); *In re Perez*, 22 I. & N. Dec. 1325 (BIA 2000) (over seven months); *In re Lopez-Meza*, 22 I. & N. Dec. 1188 (BIA 2000) (over thirteen months); *In re Puente*, 22 I. & N. Dec. 1006 (BIA 1999) (over ten months).

[29] *See, e.g.*, Lodging at L-17 (J.L. spent an additional five months in detention on an appeal INS later abandoned); Lodging at L-18 (INS appeal from termination of proceedings resulted in 160 days of additional detention for S.N. before INS defaulted by failing to file an appellate brief); Lodging at L-19 (After INS filed a notice of appeal from a cancellation grant, K.R. spent an additional ninety-seven days in detention before INS withdrew the appeal).

they properly fall within the statute. Pet. Br. at 26. This argument misapprehends the constitutional defect in mandatory detention, which is the lack of an individualized inquiry into the dangerousness and flight risk posed by a detainee. But even where the government's classification of a given detainee under § 1226(c) is in question, this mechanism does not provide a meaningful remedy to wrongful detention. To qualify for a bond, individuals must show that the government is substantially unlikely to prevail on the claim that they are removable under a category listed in § 1226(c). *See In re Joseph*, 22 I. & N. Dec. 799, 806 (BIA 1999). Immigration judges are bound to follow precedent decisions of the BIA, 8 C.F.R. § 3.1(g) (2002), even though the BIA revisits its own views on these classifications with some frequency, *see, e.g.*, *In re Yanez-Garcia*, 23 I. & N. Dec. 390 (BIA 2002) (reversing *In re K-V-D-*, 22 I. & N. Dec. 1163 (BIA 1999)). Making facial assessments on which arguments may prevail is difficult in this unsettled area of the law. Even the BIA appears to have difficulty in making these assessments.

- **Sengchanh Phengphonsavanah**, a citizen of Laos and a lawful resident since 1982, was arrested by INS shortly after completing a sentence for use of a vehicle without the owner's consent. He challenged the denial of bond, and on August 30, 2000, the immigration judge found him ineligible for release under § 1226(c) because he was charged as an aggravated felon. He appealed the determination and the BIA affirmed it *per curiam* on December 8, 2000, ninety-nine days later. However, when the BIA adjudicated the merits of Mr. Phengphonsavanah's case an additional five months later, it reversed itself, finding that his conviction did not, after all, constitute an aggravated felony. After more than a year in detention, Mr. Phengphonsavanah's proceedings were terminated.[30]

[30] Lodging at L-20.

Furthermore, appeals of custody status determinations may last as long as or even longer than the period of removal proceedings, and are widely regarded as futile for that reason. Joseph Okeke, whose case is discussed *supra* p. 17, was granted a hearing on the propriety of his mandatory detention on July 20, 1999, sixteen days after he was detained. The immigration judge determined that he was properly held under § 1226(c) notwithstanding his argument that his conviction, a first offense, did not meet the federal definition of a conviction for purposes of removability. His appeal of this determination was filed on July 26, 1999 and was still pending five months later, when he was granted cancellation of removal and released. *See* Lodging at L-6; *see also Thomas v. Reno*, No. 00-3493, slip op. (D.N.J. Oct. 11, 2001) (BIA decision on custody status rendered approximately six months after IJ determination); *In re Rojas*, 23 I. & N. Dec. 117 (BIA 2001) (decision rendered 215 days after IJ determination); *Joseph*, 22 I. & N. Dec. at 799 (decision rendered 106 days after IJ determination). Such hearings thus do not represent an adequate "safety valve," even on the limited issues they address.

More fundamentally, the hearing that is provided to those detained under § 1226(c) does not address the critical issue: whether an individual poses a flight risk or a danger to the community. In cases where those subject to detention under § 1226(c) have been granted bond hearings – either through federal court intervention or for other reasons – it becomes abundantly clear that many in fact represent little or no flight risk or danger.

° In March 2002, INS charged **Primitivo Molina** with removability as an alien convicted of two CIMTs based on two misdemeanor assault charges. The immigration judge did not consider the second crime to constitute a CIMT and set the minimum permitted bond of $1,500. INS did not appeal from this low bond, which Mr. Molina's family was able to post the same day. Several weeks later, when INS issued new charging papers asserting that the same conviction

was an aggravated felony, INS re-arrested Mr. Molina. The immigration judge denied bond pursuant to § 1226(c). No new facts concerning Mr. Molina's flight risk or dangerousness were adduced at the second custody hearing. The only thing that had changed was his re-classification as an aggravated felon for the same underlying conduct.[31]

Similarly, Mr. Van Eeten, whose case is discussed *supra* p. 10, was granted a bond of $5,000, when he was finally awarded an individualized bond hearing after a federal court found his mandatory detention unconstitutional. As noted, outside of detention, he successfully prosecuted his claim to citizenship. Lodging at L-4. Rayford Gill, a citizen of Belize and lawful resident since 1994, won a similar challenge and was granted a $5,000 bond. He has left detention and is currently pursuing his claim that he is not removable for his single offense of drug possession. *See Gill v. Ashcroft*, No. 01 C 9789, 2002 WL 1163729, at *1, *6 (N.D. Ill. May 31, 2002); Lodging at L-23.

CONCLUSION

Amici are firsthand witnesses to the tremendous costs exacted by § 1226(c). Our loved ones, community members, and clients suffer a complete deprivation of liberty under a system that refuses to see those detained as individuals.

---

[31] Lodging at L-21. The arbitrariness of this classification, and its irrelevance to flight risk and danger, was brought into even sharper relief when Mr. Molina's sentence was subsequently vacated, rendering him no longer an aggravated felon. *See id.* Perhaps even more illogically, § 1226(c) prevents any possibility of release even for individuals who, if they abandoned claims to relief from removal, would clearly qualify for release under this Court's recent ruling in *Zadvydas v. Davis*, 533 U.S. 687 (2001). *See Chanthanounsy*, 2002 WL 1477170, at *1-2; Lodging at L-24 (Laotian national held for two years pending an administrative appeal although the INS would have been presumptively obliged to release him had he not appealed his deportation).

The burden of prolonged detention is inflicted on the basis of immigration charges that are frequently proved unsustainable or from which the law provides relief. Yet mandatory detention impedes their ability to answer the charges against them and forecloses any individualized consideration of risk of flight or dangerousness. *Amici* seek a ruling that these individuals be afforded the opportunity to demonstrate their fitness for release. For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Dated: October 28, 2002
New York, NY

Respectfully submitted,

NANCY MORAWETZ
Counsel of Record
WASHINGTON SQUARE LEGAL SERVICES, INC.
161 Avenue of the Americas,
4th Floor
New York, NY 10013

Attorney for Amici

On the brief:

ALEXSA M. ALONZO
J.D. Candidate
New York University School of Law

ISAAC WHEELER
J.D. Candidate
New York University School of Law

APPENDIX
STATEMENTS OF INTEREST

Human Rights Advocates is an organization that provides education about the application of international human rights in both domestic and international fora. Its ultimate objective is to advance the cause of human rights so that basic protections are afforded to all individuals. Human Rights Advocates has appeared as *amicus* before a number of U.S. courts, including the United States Supreme Court, the Second, Fifth, Ninth, and Tenth Circuit Courts of Appeals, and the California Supreme Court. Human Rights Advocates has also appeared before a number of international fora, including the Inter-American Commission on Human Rights, the United Nations Commission on Human Rights, and the Sub-Commission on the Promotion and Protection of Human Rights.

Human Rights Watch is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices.

The **Extradition and Human Rights Committee of the American Branch of the International Law Association** ("Extradition Committee") is comprised of individuals from the academic, public and private sectors who have extensive experience in the field of international law and, specifically,

human rights law.[1] Members of the Extradition Committee have taught subjects such as international law, human rights law, and foreign relations law, and have written extensively in these fields. Furthermore, members of the Extradition Committee have participated in human rights litigation throughout the United States. The Extradition Committee has a longstanding interest in the development of international human rights law. It is committed to the international legal order, the rule of law, and the protection of fundamental human rights.

---

[1] The Extradition and Human Rights Committee is one of a number of committees of the American Branch of the International Law Association. The views expressed herein represent only those of the Extradition and Human Rights Committee of the American Branch of the International Law Association. Not all members of the Committee participated in this project.

Supreme Court, U.S.
FILED
OCT 28 2002
CLERK

No. 01-1491

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION & NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

HYUNG JOON KIM,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF *AMICI CURIAE* THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, , NATIONAL IMMIGRATION FORUM, ET AL.* IN SUPPORT OF RESPONDENT

VINCENT A. ENG
KATHERINE NEWELL BIERMAN
NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM
1140 Connecticut Avenue NW
Suite 1200
Washington, DC 20036
(202) 296-2300

RICHARD A. CORDRAY
Counsel of Record
ANDREW B. CLUBOK
EUGENE F. CHAY
ELIZABETH CHEUNG
KIRKLAND & ELLIS
655 Fifteenth Street NW
Suite 1200
Washington, DC 20005
(202) 879-5000

Counsel for the *Amici Curiae*
*Additional Parties Listed on Inside Cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

32 pp

WILLIAM L. TAYLOR
ROB RANDHAVA
LEADERSHIP CONFERENCE ON
CIVIL RIGHTS
1629 K St. NW
Suite 1010
Washington, DC 20006
(202) 466-6058

CAROL F. KHAWLY
KAREEM W. SHORA
AMERICAN-ARAB ANTI-
DISCRIMINATION COMMITTEE
4201 Connecticut Avenue, NW
Suite 300
Washington, DC 20008
(202) 244-2990

ASIAN AMERICAN INSTITUTE
4753 N. Broadway, Suite 904
Chicago, Illinois 60640
(773) 271-0899

Richard G. Konda
ASIAN LAW ALLIANCE
184 Jackson Street
San Jose, CA 95112
(408) 287-9710

JOANNIE C. CHANG
ASIAN LAW CAUCUS
939 Market Street, Suite 201
San Francisco, CA 94103
(415) 896-1701

MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL
FUND
634 S. Spring Street
Los Angeles, CA 90014
(213) 629-2512

STEWART KWOH
MARK YOSHIDA
ASIAN PACIFIC AMERICAN LEGAL
CENTER OF SOUTHERN
CALIFORNIA
1145 Wilshire Boulevard,
2nd Floor
Los Angeles, CA 90017
(213) 977-7500

LISA E. CHANG
NATIONAL ASIAN PACIFIC
AMERICAN BAR ASSOCIATION
1341 G Street, NW #500
Washington, DC 20005
(202) 421-9039

SHOBA SIVAPRASAD
NATIONAL IMMIGRATION FORUM
220 I. St., NE
Suite 220
Washington, D.C. 20002
(202) 544-0004

SOUTHEAST ASIA RESOURCE
ACTION CENTER
1628 16th Street, NW
Washington, DC 20009
(202) 667-4690

QUESTION PRESENTED

Whether Title 8, Section 1226(c) of the United States Code violates the due process rights of lawful permanent residents and other aliens by requiring their mandatory detention without the benefit of a bond hearing and without a prescribed time limitation pending a hearing to determine whether the individual shall be removed from the country?

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

INTRODUCTION 5

SUMMARY OF ARGUMENT 6

I. THE DUE PROCESS CLAUSE PROTECTS THE FUNDAMENTAL LIBERTY INTERESTS OF LAWFUL PERMANENT RESIDENTS. 9

II. SECTION 1226(c) DENIES RESPONDENT HIS RIGHT TO DUE PROCESS OF LAW. 10

A. Under Any Level of Scrutiny of Respondent's Liberty Interest, Section 1226(c) Violates Due Process. 10

B. Section 1226(c) Violates Due Process Because It Lacks Appropriate Procedural Safeguards..... 14

1. The liberty interest at stake here is severely infringed by section 1226(c). 15

2. Mandatory detention with no individualized determination creates an extreme risk of erroneous deprivation of liberty. 16

3. The government's duty to provide individual hearings prior to detention imposes only a minimal burden..... 17

C. These Fundamental Liberty Interests Are Not Extinguished Unless or Until a Final Order Is Entered on Removal..... 19

III. CONGRESS'S PLENARY POWER OVER IMMIGRATION MATTERS IS CONFINED BY CONSTITUTIONAL LIMITS. 20

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Armstrong v. Manzo,
380 U.S. 545 (1965) 15

Buckley v. Valeo,
424 U.S. 1 (1976) 22

Carlson v. Landon,
342 U.S. 524 (1952) 21

Danh v. Demore,
59 F. Supp. 2d 994 (N.D. Cal. 1999) 11, 13

Fiallo v. Bell,
430 U.S. 787 (1977) 22

Foucha v. Louisiana,
504 U.S. 71 (1992) 15, 16, 23

Galvan v. Press,
347 U.S. 522 (1954) 21, 22

Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 9

Hoang v. Comfort,
282 F.3d 1247 (10th Cir. 2002) 11, 14

INS v. Chadha,
462 U.S. 919 (1983) 21, 22

INS v. St. Cyr,
533 U.S. 289 (2001) 20

Kim v. Ziglar,
276 F.3d 523 (9th Cir.),
cert. granted, 122 S. Ct. 2696 (2002) 14

Landon v. Plasencia,
459 U.S. 21 (1982) 9, 15

Martinez v. Greene,
28 F. Supp. 2d 1275 (D. Colo. 1998).....11

Mathews v. Diaz,
426 U.S. 67 (1976).....23

Mathews v. Eldridge,
424 U.S. 319 (1976).....7, 15, 16

Patel v. Zemski,
275 F.3d 299 (3d Cir. 2001).....11, 13

Phan v. Reno,
56 F. Supp. 2d 1149 (W.D. Wash. 1999).....11

Reno v. Flores,
507 U.S. 292 (1993).....10, 11, 16

United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950).....9

United States v. Salerno,
481 U.S. 739 (1987).....11, 12

Welch v. Ashcroft,
293 F.3d 213 (4th Cir. 2002).....11

Wong Wing v. United States,
163 U.S. 228 (1896).....10

Zadvydas v. Davis,
533 U.S. 678 (2001)..... passim

STATUTES

8 C.F.R. § 1.1(p) 13, 19

8 C.F.R. 3.1(e).....14

8 U.S.C. § 1101(a)(20).....13, 19

8 U.S.C. § 1153(a) 13

8 U.S.C. § 1153(b) 13

8 U.S.C. § 1226(c) ..... passim

8 U.S.C. § 1226(c)(2).....5

8 U.S.C. § 1231(a) 19

Illegal Immigration Reform and Immigrant
Responsibility Act of 1996,
Pub. L. No. 104-208, 110 Stat. 3009-546 5

Immigration and Nationality Act,
8 U.S.C. § 1101 *et seq.*.....5

U.S. CONST. amend. V 9

U.S. CONST. amend. VIII 15

RULES

S. Ct. R. 37.6.....1

INTEREST OF AMICI CURIAE[1]

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. The question presented by this case is of great interest to NAPALC because it implicates the availability of civil rights protections for Asian Pacific Americans in this country.

The Leadership Conference on Civil Rights ("LCCR") is a coalition of more than 180 national organizations committed to the protection of civil and human rights in the United States. The LCCR works in cooperation with other national, regional and local organizations on policy analysis, public education and advocacy activities relating to immigration and other important issues affecting civil rights. The coalition has a particular concern that in striking the necessary balance between concerns of national security and of freedom, and ensuring individual rights to liberty and fair treatment are not unduly trammeled. Accordingly, we have conducted investigations into the detention of immigrants, have supported legislation to ensure fair treatment of immigrants, and filed an *amicus curiae* brief in the *INS v. St. Cyr* case seeking the same objectives. The Leadership Conference believes that in our increasingly diverse nation,

---

[1] The parties consented to this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, the undersigned counsel for the *amici curiae* state that they alone authored this brief, and no other persons or entities have made any monetary contribution to its preparation or submission.

fair and equal treatment is essential to achieving the constitutional goal of domestic tranquility.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases in the area of immigrants' rights since the organization's founding. Preserving the constitutional due process rights of immigrants is a primary goal of MALDEF's Immigrants' Rights program.

The American-Arab Anti-Discrimination Committee ("ADC") is the national association of Arab Americans that works in every sphere of public life to promote and defend the interests of the Arab-American and Arab immigrant community. ADC is the largest non-sectarian, non-partisan civil rights organization in America dedicated to protecting the civil rights of Americans of Arab descent, and is an active member of the Leadership Conference on Civil Rights and the Detention Watch Network national coalitions. With headquarters in Washington, D.C., ADC also has more than 80 membership chapters nationwide. ADC works with other civil rights organizations and coalitions on a multitude of issues that affect constitutional freedoms. ADC is committed to preserving the constitutional guarantees of due process to all and views those guarantees as elemental rights that form the key foundations of our nation. We believe that only by safeguarding due process rights for all individuals subject to the pendency of removal proceedings can the courts affirm the solidly American principles of constitutional democracy championed by our nation for decades.

The Asian American Institute is a pan-Asian, non-profit organization dedicated to the empowerment of the Asian American community through research, education, and coalition-building. Over 76% of the Asian American population in the communities for which we provide is

foreign-born, and a significant number are legal permanent residents. The Constitution guarantees the right to due process for all persons regardless of citizenship status, and mandatory detention during the pendancy of removal proceedings is an unjustifiable denial of this right. The disparate and harmful impact of this law has been felt throughout our community.

Asian Law Alliance ("ALA") was founded 25 years ago by Santa Clara University Law Students to provide legal assistance, education and advocacy to the Asian Pacific Islander Community in Santa Clara County. As the only legal services organization serving the Asian and Pacific Islander population in Santa Clara County, ALA is dedicated to ensuring top-quality multilingual legal assistance to promote dignity, self-reliance and a better quality of life for the people it assists.

Established in 1972, the Asian Law Caucus, Inc. ("ALC") is the country's oldest civil rights and public interest legal organization whose mission is to promote, advance, and represent the civil rights of the Asian American and Pacific Islander community. The ALC represents primarily low-income, monolingual or limited English proficient Asian American and Pacific Islanders in the areas of employment, labor, immigration, housing, community development, and civil rights through the provision of direct services, community education, litigation, and policy advocacy.

The Asian Pacific American Legal Center of Southern California ("APALC") is the largest provider of direct legal services, civil rights advocacy, community education and impact litigation for low-income Asian Pacific Americans in the country. Since 1982, APALC has represented Asian Pacific Americans in a number of areas, including immigration, anti-discrimination, workers' rights, family law, and hate crimes. APALC has worked on cases involving immigrants detained by the INS and also on policy advocacy and individual cases affecting immigrants' rights.

The National Asian Pacific American Bar Association ("NAPABA") is the national professional association of Asian-Pacific American attorneys, judges, law professors, and law students. The goal of NAPABA is to represent and advocate for, on a national level, the interests of Asian-Pacific American attorneys, judges, law professors and law students and their communities. Ensuring fair treatment of Asian Americans and Pacific Islanders within the United States is squarely within the goals of NAPABA, as an organization committed to justice and equality for all people residing in the United States, including lawful permanent residents.

The National Immigration Forum ("Forum"), one of the nation's premier immigration policy organizations, advocates and builds public support for public policies that welcome immigrants and refugees and that are welcoming to newcomers in our country. The mission of the Forum is to embrace and uphold America's tradition as a nation of immigrants. Based in Washington, DC the Forum has distinguished itself as one of the nation's foremost authorities on immigration. By employing an effective combination of advocacy, legal research, media work and public education, the Forum provides accurate, reliable data to our nation's policy-makers, the press, and the public about the need for fair and supportive immigration laws and policies.

The Southeast Asia Resource Action Center is a national advocacy organization that works to advance the interests of Cambodian, Laotian, and Vietnamese Americans, most of whom arrived in this country as refugees, and many of whom continue to lack English proficiency, basic education, and access to affordable legal representation. Because significant numbers of our community are legal permanent residents, the immigration reform laws of 1996 and other policies that take away benefits from immigrants have a devastating impact on our families. Among these individuals are a growing number of lawful permanent residents who

face or will face mandatory detention under the statutory provisions at issue here.

INTRODUCTION

At issue here is the constitutionality of a portion of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, which amended the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.* The IIRIRA created a new section 236(c) of the INA, 8 U.S.C. § 1226(c), which now requires the Attorney General to detain aliens who are deportable from the United States because they have been convicted of certain enumerated offenses. Under section 1226(c), these individuals must be detained during the pendency of administrative hearings on their removal, without any opportunity for a hearing or individualized determination about whether that disposition is appropriate to their circumstances, and even where they have already discharged the full sentence for any prior offense.[2]

Section 1226(c) does not provide any due process protections whatsoever prior to mandatory detention pending removal proceedings, nor is a maximum length of time for such detention prescribed by the statute. Under the plain language of section 1226(c) and petitioners' interpretation of its terms, the Attorney General is to detain aliens falling under its purview for an indefinite period without providing for a hearing or any opportunity for an individualized determination. Even in cases involving lawful permanent residents such as respondent – the category of aliens who enjoy the broadest constitutional protections – this indefinite period of detention may extend for months or even years.

---

[2] The only exceptions to mandatory detention are for government witnesses or those who are assisting in government investigations. *See* 8 U.S.C. § 1226(c)(2). Neither exception is applicable here.

SUMMARY OF ARGUMENT

I. The Due Process Clause of the Fifth Amendment protects individuals from any deprivation of life, liberty, or property without due process of law. This protection is not limited to citizens alone. On the contrary, this Court's jurisprudence has long held that the Due Process Clause serves to protect citizens and non-citizens alike. Particularly in the case of a lawful permanent resident such as respondent, the Due Process Clause stands as a constitutional guarantee to guard against any deprivation of liberty without due process of law.

II.A. Under any standard of review, section 1226(c) violates the due process rights of lawful permanent residents. Whether the Court employs strict scrutiny, the "special justifications" test, or some other approach, its established jurisprudence dictates a finding that the indefinite detention of lawful permanent residents – without any opportunity for an individualized determination and with no possibility of release on bond pending the removal hearing – denies them due process of law. Under the Court's precedents, such a broad and open-ended restriction on personal liberty violates due process whenever the restriction is excessive in light of its purpose.

The Government has asserted two interests that allegedly support the constitutionality of section 1226(c): (1) ensuring that aliens will be available for their removal hearings; and (2) protecting the public from dangerous aliens. Neither of these interests properly supports the constitutionality of this provision as applied to lawful permanent residents. According to the government's own data, the vast majority of aliens released on bond during the pendency of their removal hearings do not flee during that period. Moreover, the statute requires detention for aliens convicted of many nonviolent crimes – such as fraud in obtaining benefits, perjury, forgery, and harboring an undocumented alien – even where they have fully discharged their sentences and

been released back into the community. Mandatory detention of all such individuals on the grounds that they pose a public danger, without any individualized assessment of their circumstances, cannot be justified. At bottom, the mandatory detention ordered by the statute is ill-suited to achieve the Government's stated goals, and it is insufficiently supported by special justifications that would survive any meaningful level of judicial scrutiny.

The disproportionate reach of the statute can also be seen in the absence of any definite time limitation on the detention of these individuals who are not yet subject to a final order of removal. Although the statute sets an ultimate endpoint – *i.e.*, the issuance or denial of a removal order – the duration of the detention is open-ended, extending for as long as the removal process drags out, whether that be months or years. In substance, section 1226(c) is a temporally unbounded restriction on personal liberty that cannot be justified here as applied to lawful permanent residents such as respondent.

II.B. Under the standards promulgated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), a three-part balancing test is applied to determine whether a constitutional violation has occurred. The pertinent factors include: (1) the magnitude of the private interest at stake – *i.e.*, the severity of the deprivation; (2) the risk of an erroneous deprivation and the likelihood that particular procedural safeguards will avoid the error; and (3) the governmental interest in requiring procedures that do not afford these safeguards.

Mandatory detention under section 1226(c) fails this test. *First*, it deprives all such individuals of freedom from incarceration, which the Constitution and the Court recognize as a core liberty interest. *Second*, absent any individualized determination, the risk of wrongful deprivation of that liberty interest is extremely high. Hearings would screen out from detention lawful permanent residents who pose little risk of flight, who were convicted of

non-violent crimes, or whose sentences were completed or suspended in circumstances that posed no continuing risk of danger to the public.

Third, affording the opportunity for an separate and immediate individual hearing where the government bears the burden of proof is a sound alternative to mandatory detention that will reduce the risk of flight, protect the public safety, and guard against unnecessary deprivations of liberty interests. The government states no persuasive countervailing interest in having a process that does not afford the safeguard of a hearing. The costs to the Government of such hearings would be offset by the savings realized if the Government were not required to detain all aliens under section 1226(c). In light of these factors, the broad sweep of this statute clearly violates the due process rights of lawful permanent residents such as respondent.

II.C. The liberty interests violated by mandatory detention are not affected by whether a lawful permanent resident later decides to raise a challenge to his ultimate removal. Petitioners seem to argue that no due process violations occur under the terms of section 1226(c) because, they contend, most of those who are detained under the statute are eventually ordered to be removed. This argument misses the point. Unless and until respondent is removed from the United States, he has not surrendered his constitutional right to due process under the law. Just as a criminal suspect cannot be denied the right to bail simply because the vast majority of suspects may eventually be convicted, a lawful permanent resident cannot be denied his rights simply because statistics may indicate that he is likely, on average, to be removed.

III. Congressional power to enact laws that govern the exclusion or expulsion of aliens is not unfettered. Its implementation is bound by the limits of the Constitution. At issue here is not a question regarding the deportability of respondent, nor even the propriety of an immigration

proceeding; instead, it concerns the constitutional validity of arbitrary incarceration pending removal. In particular, respondent challenges the constitutionality of the statutory requirement that respondent and others similarly situated shall be mandatorily detained, without the possibility of release on bond, during the pendency of the processes for their removal hearings. This case does not bring into question Congress's right to decide whether to remove aliens, grant or deny admission to aliens, or subject aliens to supervision. The only question before the Court is whether a statutory mandate that a general class of aliens must be detained pending a removal hearing can be invoked to deny lawful permanent residents the right to an individualized determination about whether detention is necessary and appropriate in their personal circumstances.

ARGUMENT

I. THE DUE PROCESS CLAUSE PROTECTS THE FUNDAMENTAL LIBERTY INTERESTS OF LAWFUL PERMANENT RESIDENTS.

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. An alien seeking initial admission to the United States has no constitutional rights regarding an application for admission. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). Yet "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Indeed, such persons stand "on an equal footing with citizens" under the Constitution with respect to protection of personal liberty. *Harisiades v. Shaughnessy*, 342 U.S. 580, 586, 587 n.9 (1952).

Accordingly, the Court has held that a lawful permanent resident who has been "continuously present" in the United States has a right to due process of the law in any

proceedings to remove that alien from the country, including the right to be free of arbitrary confinement pending deportation proceedings. *See, e.g., Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("all persons within the territory of the United States are entitled to the protection guarant[e]ed by [the Fifth and Sixth] [A]mendments"). As a lawful permanent resident, respondent is thus entitled to the full guarantees provided by the Due Process Clause.

II. SECTION 1226(c) DENIES RESPONDENT HIS RIGHT TO DUE PROCESS OF LAW.

Section 1226(c) instructs the Attorney General to detain aliens who are deportable by virtue of their prior convictions for certain offenses, even after they have completed their lawful sentences and been released into the community. Under this statute, detained aliens are confined pending the outcome of administrative hearings conducted on the question of their removal. Until such time, however, section 1226(c) requires these persons to be detained without possibility of bonded release and with no procedural safeguards to ensure that detention is appropriate and its duration is not unduly extended. It is these requirements to detain aliens indefinitely and deprive them of the benefit of an individualized hearing into their personal circumstances that renders the statute unconstitutional. The application of section 1226(c) necessarily violates the due process rights of lawful permanent resident aliens who are affected by its terms.

A. Under Any Level of Scrutiny of Respondent's Liberty Interest, Section 1226(c) Violates Due Process.

When analyzing whether a statute violates due process rights, this Court must first determine what level of scrutiny to apply, and then determine whether the statute in question

survives the applicable standard of review. Whether the Court employs a more traditional strict scrutiny standard or the "special justifications" test articulated in *Zadvydas v. Davis*, 533 U.S. 678 (2001), section 1226(c) cannot pass muster. Should this Court find that respondent has a fundamental liberty interest in freedom from physical restraint, as most lower courts have done, then strict scrutiny applies and section 1226(c) will be invalidated absent a compelling state interest.[3] At any level of scrutiny, however, the result should be the same. At the very least, the Court's precedents require section 1226(c) to be supported by "special justifications" that outweigh the "individual's constitutionally protected interest in avoiding physical restraint" in order to withstand due process review. *Zadvydas*, 533 U.S. at 690 (citations and quotations omitted); *see also Reno v. Flores*, 507 U.S. at 315-16 (O'Connor, J., concurring) (core liberty interest implicated by confinement requires "heightened" scrutiny). It is the utter absence of any such justifications that renders section 1226(c) invalid under the Due Process Clause.

For due process concerns relating to regulatory confinement, this Court's decision in *United States v. Salerno*, 481 U.S. 739 (1987), is particularly instructive. Under the two-part test articulated in *Salerno*, a direct restriction on personal liberty violates due process when: (1) the restriction constitutes impermissible punishment; or (2) absent express intent to impose punitive restrictions, the

---

[3] *See, e.g., Hoang v. Comfort*, 282 F.3d 1247, 1257-59 (10th Cir. 2002) (finding fundamental liberty interest and employing strict scrutiny); *Patel v. Zemski*, 275 F.3d 299, 308-13 (3d Cir. 2001) (finding fundamental liberty interest and employing heightened scrutiny); *Danh v. Demore*, 59 F. Supp. 2d 994, 1001 (N.D. Cal. 1999) (same); *Phan v. Reno*, 56 F. Supp. 2d 1149, 1154 (W.D. Wash. 1999) (strict scrutiny); *Martinez v. Greene*, 28 F. Supp. 2d 1275, 1282 (D. Colo. 1998) (same). *Cf. Welch v. Ashcroft*, 293 F.3d 213, 218-228 (4th Cir. 2002) (declining to apply strict scrutiny but finding due process violation).

restriction is excessive in relation to its purpose. *See id.* at 747. Judged under this framework, section 1226(c) violates due process.

The Government has two stated interests that are allegedly served by mandatory detention of individuals in accordance with the terms of 1226(c): (1) ensuring that the individual will not flee prior to the removal hearing; and (2) protecting the public from potentially dangerous individuals. *See* Pet. Br. at 11-22. Measured in light of these justifications, the statute is simply too excessive to pass muster as applied to lawful permanent residents.

Notably, petitioners do not contend that *every* lawful permanent resident alien detained pursuant to section 1226(c) is a flight risk or presents a public danger. Rather, petitioners seek to justify the provisions of the statute by noting that approximately 20% of criminal aliens released on bond or otherwise not detained during the pendency of a removal hearing fail to appear. *See* Pet. Br. at 19. To justify *mandatory* detention of 80% of lawful permanent residents who would otherwise not abscond by pointing to a "failure to appear" rate of 20% among *all* aliens released on bond or otherwise not detained is plainly excessive. Thus the Government's own statistics demonstrate that the vast majority of aliens who are released on bond do not abscond and do not present an actual flight risk.[4]

---

[4] Petitioners cite other statistics to bolster their claim that mandatory detention is necessary to ensure that aliens will attend their removal hearings. *See* Pet. Br. at 19-20 & n.7. However, the relevant rate is that only about 20% of criminal aliens *released on bond during the pendency of a removal hearing* fail to appear for their removal proceedings. The other statistics cited by the Government pertain to aliens who were never taken into custody and aliens who were the subject of final orders for removal. *See id.* at 19-20. Those numbers are thus irrelevant to the inquiry here and to the task of justifying the mandatory detention provisions of section 1226(c).

Indeed, it is virtually undeniable that the "failure to appear" rate will be considerably lower among lawful permanent residents, like respondent, than among other aliens. These individuals have the closest ties to the United States of any category of aliens. About two-thirds of them are admitted because of family members who are already in the United States, who themselves are often citizens. *See* 8 U.S.C. § 1153(a). They have the right, without limitation, to reside and work in this country, and retain their rights until a final administrative order of removal is entered against them. *See* 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1.1(p). Many lawful permanent residents are highly educated or skilled professionals whose entry is encouraged because they make important contributions to our society and to the American economy. *See* 8 U.S.C. § 1153(b). The risk of flight is thus reduced even further for such individuals.

The Government's other justification – protecting the public against potentially dangerous individuals – is also not reflective of the broad sweep of section 1226(c). The terms of the statute serve to detain many individuals who have been convicted of crimes that are not traditionally considered to be "dangerous," such as fraud in obtaining benefits, *see, e.g., Danh v. Demore*, 59 F. Supp. 2d 994 (N.D. Cal. 1999), or harboring an undocumented alien, *see, e.g., Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001). Moreover, most of these persons have completed the terms of the sentence imposed for their prior offenses and have frequently been released into the community, all of which indicates that an individualized judgment has already been made, pursuant to the applicable processes of the criminal law, that they pose no serious or continuing danger to the public.

Perhaps most important, section 1226(c) is excessive because it provides for unfettered and virtually unlimited mandatory detention. By its own terms, section 1226(c) requires these individuals to be confined without any possibility of bonded release for an indefinite period during the pendency of their removal proceedings. Although there

is a clearly identifiable event that marks the completion of their detention period (*i.e.*, issuance of a final order), there is no clearly identifiable deadline by which that event must take place. As the lower court cases illustrate, the terms of section 1226(c) permit individuals to be detained without possibility of release, and with no individualized determination, for months or even years while waiting for their removal proceedings to be completed.[5]

Petitioners miss the point when they note that removal proceedings are completed in an average time of 47 days and a median time of 30 days.[6] Pet. Br. at 39-40 (citing *Zadvydas*, 533 U.S. at 701). Regardless of what the "average" practice may be, the statute clearly permits mandatory detention that is unlimited in time, since the date of a final order in the removal proceeding simply cannot be forecast.

B. Section 1226(c) Violates Due Process Because It Lacks Appropriate Procedural Safeguards.

"A fundamental requirement of due process is 'the opportunity to be heard' . . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Any interference with personal liberty must be implemented fairly and must provide for adequate procedural safeguards against wrongful deprivations. *See Salerno*, 481 U.S. at 746; *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). It is the IIRIRA's elimination of vital procedural safeguards that renders section 1226(c) violative of due process requirements. The statute's provisions for mandatory detention without the benefit of a hearing or any possibility for release on bond disavows the very mechanism that aliens previously invoked to show they are neither flight risks nor dangerous to the public. And indeed, this mechanism is endemic to the American legal and constituitonal system. *See* U.S. CONST. amend. VIII.

For this reason, as discussed below, section 1226(c) cannot pass constitutional muster. To judge conformity with procedural due process, the Court employs a balancing test to weigh the following factors: (1) the magnitude of the private interest at stake – *i.e.*, the severity of the deprivation; (2) the risk of an erroneous deprivation and the likelihood that particular procedural safeguards will avoid the error; and (3) the governmental interest in requiring procedures that do not afford these safeguards. *See Mathews*, 424 U.S. at 335; *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

1. The liberty interest at stake here is severely infringed by section 1226(c).

The private interest to be free from arbitrary detention is considerable. As explained more fully in briefs submitted by other *amici curiae*, mandatory detention severely harms respondent and all others who are similarly situated. *See generally* Amicus Br. of Citizens § IV. As noted, the private interest at issue here is the individual's fundamental interest in "[f]reedom from imprisonment – from government custody, detention, or other forms of physical restraint – [that] lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690, *quoting Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

---

[5] For example, respondent in the case at bar spent more than three months in INS custody before he began *habeas corpus* proceedings. *Kim v. Ziglar*,, 276 F.3d 523, 526 (9th Cir.), *cert. granted*, 122 S. Ct. 2696 (2002); *see also* Pet. Br. at 4. Detaining an alien for a period of months does not appear to be outside the norm. *See e.g., Hoang*, 282 F.3d at 1252-53 (detailing detention of three aliens for as many as three months before *habeas* petitions were filed).

[6] This estimation by petitioners fails to account for the time aliens will spend detained pending adjudication of appeals, which can take up to 180 days. *See* 8 C.F.R. 3.1(e). This time frame does not include 21 days for submitting briefs (which can be extended), and 30 days for filing the notice of appeal. Additionally, briefing is frequently delayed by months or even years while transcripts of the immigration judge proceedings are prepared.

The right to freedom from arbitrary or unjustified government detention is fundamental to any democratic society. As the Court has emphasized time and again: "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha*, 504 U.S. at 80. And Justice O'Connor has spelled out more comprehensively what is at stake here: "'Freedom from bodily restraint' means more than freedom from handcuffs, straitjackets, or detention cells. A person's core liberty interest is also implicated when she is confined in a prison, a mental hospital, or some other form of custodial institution, even if the conditions of confinement are liberal." *Flores*, 507 U.S. at 315 (O'Connor, J., concurring). The gravity of the private interest at stake here cannot be overstated, and any statute designed to interfere with this interest must provide appropriate procedural safeguards to ensure against wrongful deprivations.

2. Mandatory detention with no individualized determination creates an extreme risk of erroneous deprivation of liberty.

The second factor in the *Mathews* analysis is the risk of erroneous deprivation of liberty and whether the implementation of procedural safeguards would avoid the error. *See Mathews*, 424 U.S. at 335. Where there is no individualized hearing to determine the propriety of continued detention, the risk of erroneous detention is great. In fact, unless *all* of the individuals detained under section 1226(c) are flight risks or present a danger to the public, there is a guarantee that erroneous detention *will* occur, because the statute does not provide for *any* procedure by which to determine if an individual's particular circumstances warrant release on bond.

As discussed in Part II.A, *supra*, petitioners cannot rightly contend that *every* alien detained pursuant to section 1226(c)

is a flight risk or presents a public danger; in fact, many individuals clearly fall into neither category. Petitioner's claim that a person may be deprived of liberty without a hearing whenever there is a basis for detaining *most* people in her situation would be a recipe for mass detentions without cause.

The Government's allegations about preventing danger to the public fare no better here. Absent an individualized determination of dangerousness, it cannot simply be assumed that all or even most persons who have at one time been convicted of the crimes encompassed by section 1226(c) pose a continuing or present danger to the public. As discussed in Part II.A, *supra*, the argument that section 1226(c) exists to protect the public from dangerous criminals is specious because it applies equally to lawful permanent residents who have never been convicted of any crime that is traditionally considered to be "dangerous." Some crimes that are not traditionally labeled "dangerous," yet can still subject aliens to mandatory detention under section 1226(c), include fraud in obtaining benefits, harboring an undocumented alien, or (as in this case) petty theft with priors. Moreover, these persons have usually completed any sentence imposed for their prior offenses and have been released back into the community. In this respect, an individualized judgment has already been made by the courts that they pose no serious or continuing danger to the public. To treat all such aliens – including lawful permanent residents – the same without the benefit of any individualized determination of dangerousness violates procedural due process.

3. The government's duty to provide individual hearings prior to detention imposes only a minimal burden.

The burdens that would be imposed on the Government to conduct an individualized hearing to evaluate flight risk and dangerousness are minimal here. Any additional burden or

cost placed on the Government by requiring it to provide for an separate and immediate hearing to determine the propriety of detention would be more than offset by the savings it would enjoy by not having to detain *all* aliens who fall under section 1226(c).

Moreover, mandatory detention is an extreme solution, in particular, to concerns about the risk of flight. As discussed by other *amici curiae*, there are numerous alternatives to mandatory detention – including posting of bond or the imposition of specific conditions – that would reduce the risk of flight without impermissibly infringing on the core liberty interest to be free from incarceration. *See generally* Amicus Br. of American Bar Ass'n § II.A. From the standpoint of procedural due process, any one or more of these alternatives would be preferable to mandatory detention, as they would not result in deprivation of a fundamental liberty interest.

Section 1226(c) also is constitutionally suspect for its assumption that every individual who falls under its auspices presents a danger to the public. Such a blanket determination is akin to Congress substituting a single categorical judgment in place of those entities, including the courts, that have made individualized determinations about danger in the process of suspending sentences or granting parole. Putting aside the risk of flight, the only way that section 1226(c) can pass constitutional muster is if Congress has made a permissible assumption that *all* aliens who fall within the terms of the statute present a serious and continuing threat to the public safety, which is untenable given the broad sweep of the statute.

Finally, it cannot be maintained that aliens detained pursuant to section 1226(c) have already had an opportunity for a hearing in the form of the criminal proceeding that led to the conviction or plea that triggered their mandatory detention under this statute. The focus of a due process hearing for these purposes would be markedly different from the proceedings in any criminal trial, and would more closely

resemble a bail hearing. Moreover, the factors relevant to flight risk and public danger are fluid and may change over the course of time. After the terms of a criminal sentence have been fully served, and those obligations have been discharged, the question of subsequent detention pending a removal hearing involves a different set of facts relating to flight risk and public danger. These facts must be evaluated in an individualized hearing at that time in order to comport with constitutional due process.

C. These Fundamental Liberty Interests Are Not Extinguished Unless or Until a Final Order Is Entered on Removal.

It is worthy of emphasis that respondent does not assert an absolute right to be released during the pendency of a removal hearing, but only the narrow right to an individualized hearing to determine whether release on bond would be appropriate. Even then, as the Court stated in *Zadvydas*: "The choice . . . is not between imprisonment and the alien 'living at large.' . . . It is between imprisonment and supervision under release conditions that may not be violated." *Zadvydas*, 533 U.S. at 696 (citation omitted).

Moreover, the validity of an alien's challenge to removal has no bearing on whether this statute violates her due process rights. A lawful permanent resident such as respondent has the statutory right to reside in the United States until such time as a final removal order is issued against him. *See* 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1.1(p). Unless or until that happens, regardless of the stages of those proceeding, such persons have not lost their legal right to remain in the country. Indeed, even the statute that governs the detention of aliens *after* they have had a final removal order entered against them includes a time limit, which makes them eligible to be considered for release from custody after ninety days have elapsed from entry of the final removal order. *See* 8 U.S.C. § 1231(a). It is irrational to

impose *more rigid* restrictions in the circumstances here, where the individual is not yet subject to a removal order.

Much of petitioners' argument elides these points, simply assuming that an eventual removal order is a foregone conclusion. Petitioners assert that "removability ordinarily will be established, *beyond dispute*, by the alien's judgment of conviction." Pet. Br. at 26 (emphasis added). Yet removal is not at all automatic, since there are initial legal issues about whether an individual's prior offenses necessarily bring her within the meaning of section 1226(c). And even aliens who have a final removal order entered against them following an appropriate hearing are not necessarily removed from the country. As petitioners themselves note, withholding of removal was granted in 3,450 cases involving criminal and non-criminal aliens in the last year alone. *See* Pet. Br. at 30. Thus the Court has correctly noted that there is "a clear difference . . . between facing *possible* deportation and facing *certain* deportation." *INS v. St. Cyr*, 533 U.S. 289, 325 (2001) (emphasis added).

At bottom, the issue here is not whether an individual will ultimately be subject to removal. Rather, it is whether that individual's right to due process of law has been conceded or extinguished. That is not the case for respondent here, nor has it occurred in any of the many similar situations around the country involving the due process rights of lawful permanent residents.

III. CONGRESS'S PLENARY POWER OVER IMMIGRATION MATTERS IS CONFINED BY CONSTITUTIONAL LIMITS.

Petitioners seek to muddy the waters by framing the issues here to invoke the doctrine that Congress has plenary powers over immigration matters. *See, e.g.*, Pet. Br. at 23. Although the Court has recognized that Congress does exercise broad control over the admission and removal of aliens, it has also taken pains to point out that this legislative authority remains subject to the limits imposed by the

Constitution. *See, e.g., Galvan v. Press*, 347 U.S. 522, 531 (1954); *Carlson v. Landon*, 342 U.S. 524, 533 (1952).

Petitioners' argument also fails to give due weight to the Court's recent holding in *Zadvydas*, which expressly held that Congress's supposed plenary power "is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695. Indeed, the challenge here is *not* to Congress's decisions about whether to admit and deport aliens. Rather, respondent's due process claim questions the *manner* in which this authority is to be implemented. As this Court stated this in *Zadvydas*, the courts can take appropriate account of Congress's authority "without abdicating their legal responsibility to review the lawfulness of an alien's continued detention." *Id.* at 700.

In urging the Court to validate section 1226(c), petitioners obscure the fact that the statute does not merely deal with immigration issues. The statute does not seek to exclude particular groups of aliens from entry to the Untied States, nor does it seek removal of particular groups of aliens. Instead, the statute sets the terms for detention of individuals who are already present in the United States. Section 1226(c), particularly as it relates to lawful permanent residents, is less invocative of plenary power than it is of the police power. The mere fact that the individuals affected are aliens does not, by itself, give Congress free rein to order those individuals to be confined without bond and with no opportunity to show why detention is unjustified in their circumstances.

In *INS v. Chadha*, 462 U.S. 919 (1983), the Court similarly rejected an improper assertion of Congress's plenary powers to justify otherwise unconstitutional legislation:

> The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question, but what is challenged here is *whether Congress has chosen a constitutionally permissible means of implementing*

> *that power*. As we [have] made clear[]: "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, . . . so long as the exercise of that authority does not offend some other constitutional restriction."

Chadha, 462 U.S. at 940-41 (emphasis added) (quoting *Buckley v. Valeo*, 424 U.S. 1, 132 (1976); other citation omitted). The Court has long recognized a difference between substantive policies regarding matters relating to immigration and the procedural mechanisms by which those policies are implemented. *See Galvan*, 347 U.S. at 530-32 ("In the enforcement of these policies [pertaining to the entry of aliens and their right to remain here] the Executive Branch of the Government must respect the procedural safeguards of due process."); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (same).

The Court strongly reinforced this point in *Zadvydas*:

> . . . we nowhere deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions. . . . The question before us is not one of "'confer[ring] on those admitted the right to remain against the national will'" or "'sufferance of aliens'" who should be removed. . . . Rather, the issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.

533 U.S. at 695 (citations omitted; brackets original).

The only tangible distinction between this case and *Zadvydas* is that here the individual aliens are subject to a subsequent hearing on removal and hence, though the Government is "unable to remove" them as yet, *id.*, it may be

able to remove them eventually. Pending any final order of removal, however, the strictures of the Due Process Clause apply with full force, *see, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 77 (1976), especially with respect to the fundamental right to freedom from imprisonment, which "has always been at the core of the liberty protected by the Due Process Clause," *Foucha*, 504 U.S. at 80. That fundamental right is infringed here.

CONCLUSION

For these reasons, section 1226(c) should be held unconstitutional as applied to lawful permanent residents and the decision below should be affirmed.

Respectfully submitted,

VINCENT A. ENG
KATHERINE NEWELL BIERMAN
NATIONAL ASIAN PACIFIC
AMERICAN LEGAL CONSORTIUM
1140 Connecticut Avenue NW
Suite 1200
Washington, DC 20036
(202) 296-2300

RICHARD A. CORDRAY
Counsel of Record
ANDREW B. CLUBOK
EUGENE F. CHAY
ELIZABETH CHEUNG
KIRKLAND & ELLIS
655 Fifteenth Street NW
Suite 1200
Washington, DC 20005
(202) 879-5000

WILLIAM L. TAYLOR
ROB RANDHAVA
LEADERSHIP CONFERENCE ON
CIVIL RIGHTS
1629 K St. NW
Suite 1010
Washington, DC 20006
(202) 466-6058

CAROL F. KHAWLY
KAREEM W. SHORA
AMERICAN-ARAB ANTI-
DISCRIMINATION COMMITTEE
4201 Connecticut Avenue, NW
Suite 300
Washington, DC 20008
(202) 244-2990

ASIAN AMERICAN INSTITUTE
4753 N. Broadway, Suite 904
Chicago, Illinois 60640
(773) 271-0899

RICHARD G. KONDA
ASIAN LAW ALLIANCE
184 Jackson Street
San Jose, CA 95112
(408) 287-9710

JOANNIE C. CHANG
ASIAN LAW CAUCUS
939 Market Street, Suite 201
San Francisco, CA 94103
(415) 896-1701

MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL
FUND
634 S. Spring Street
Los Angeles, CA 90014
(213) 629-2512

STEWART KWOH
MARK YOSHIDA
ASIAN PACIFIC AMERICAN LEGAL
CENTER OF SOUTHERN
CALIFORNIA
1145 Wilshire Boulevard,
2nd Floor
Los Angeles, CA 90017
(213) 977-7500

I'SA E. CHANG
NATIONAL ASIAN PACIFIC
AMERICAN BAR ASSOCIATION
1341 G Street, NW #500
Washington, DC 20005
(202) 421-9039

SHOBA SIVAPRASAD
NATIONAL IMMIGRATION FORUM
220 I. St., NE
Suite 220
Washington, D.C. 20002
(202) 544-0004

SOUTHEAST ASIA RESOURCE
ACTION CENTER
1628 16th Street, NW
Washington, DC 20009
(202) 667-4690

OCTOBER 2002

Supreme Court, U.S.
FILED
OCT 28 2002
CLERK

No. 01-1491

IN THE

Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR,
SAN FRANCISCO DISTRICT OF IMMIGRATION
AND NATURALIZATION SERVICE, et al.,
Petitioners,

vs.

HYUNG JOON KIM,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENT

PROFESSOR WILLIAM J. ACEVES
Counsel of Record
California Western School of Law
225 Cedar Street
San Diego, California 92101
(619) 515-1589

PAUL L. HOFFMAN
SCHONBRUN, DE SIMONE,
SEPLOW, HARRIS & HOFFMAN
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

PROFESSOR JOAN FITZPATRICK
University of Washington
School of Law
1100 N.E. Campus Parkway
Seattle, Washington 98105
(206) 543-9368

Attorneys for Amici Curiae

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (949) 720-1510

BEST AVAILABLE COPY

40 pp

No. 01-1491

IN THE

Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR,
SAN FRANCISCO DISTRICT OF IMMIGRATION
AND NATURALIZATION SERVICE, et al.,
Petitioners,

vs.

HYUNG JOON KIM,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENT

PROFESSOR WILLIAM J. ACEVES
Counsel of Record
California Western School of Law
225 Cedar Street
San Diego, California 92101
(619) 515-1589

PAUL L. HOFFMAN
SCHONBRUN, DE SIMONE,
SEPLOW, HARRIS & HOFFMAN
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

PROFESSOR JOAN FITZPATRICK
University of Washington
School of Law
1100 N.E. Campus Parkway
Seattle, Washington 98105
(206) 543-9368

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. ARBITRARY DETENTION VIOLATES INTERNATIONAL LAW 2

A. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS PROHIBITS ARBITRARY DETENTION 3

B. CUSTOMARY INTERNATIONAL LAW PROHIBITS ARBITRARY DETENTION 7

II. FEDERAL LAW MUST BE INTERPRETED IN A MANNER CONSISTENT WITH INTERNATIONAL LAW WHEN POSSIBLE 15

III. U.S. COURTS SHOULD INFORM THEIR ANALYSIS BY REFERENCE TO INTERNATIONAL AND FOREIGN PRACTICE .. 23

CONCLUSION 28

APPENDIX: STATEMENTS OF INTEREST A-1

TABLE OF AUTHORITIES

Page

CASES

Ashwander v. TVA
297 U.S. 288 (1936) 16

Atkins v. Virginia
122 S.Ct. 2242 (2002) 23

Benz v. Compania Naviera Hidalgo
353 U.S. 138 (1957) 21

Brown v. United States
12 U.S. 110 (1814) 21

Chew Heong v. United States
112 U.S. 536 (1884) 17

Committee of U.S. Citizens Living in Nicaragua v. Reagan
859 F.2d 929 (D.C. Cir. 1988) 7

Cook v. United States
288 U.S. 102 (1933) 21

Forti v. Suarez-Mason
672 F. Supp. 1531 (N.D. Ca. 1987) 7

Geofroy v. Riggs
133 U.S. 258 (1890) 19

Hartford Fire Insurance Co., v. California
509 U.S. 764 (1993) 20

Jones v. United States
529 U.S. 848 (2000) 22

Knight v. Florida
528 U.S. 990 (1999) 24

Lauritzen v. Larsen
345 U.S. 571 (1953) 21

Martinez v. City of Los Angeles
141 F.3d 1373 (9th Cir. 1992) 7

McCulloch v. Sociedad Nacional de Marineros de Honduras
372 U.S. 10 (1963) 20

Menominee Tribe of Indians v. United States
391 U.S. 404 (1968) 21

Miranda v. Arizona
384 U.S. 436 (1966) 24

Murray v. Schooner Charming Betsy
6 U.S. (2 Cranch) 64 (1804) 16, 17, 19, 20, 21

Nixon v. Shrink Mo. Gov't PAC
528 U.S. 377 (2000) 24

Paul v. Avril
901 F. Supp. 330 (S.D. Fla. 1994) 7

The Paquete Habana
175 U.S. 677 (1900) 8

Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.
291 U.S. 138 (1934) 21

Sale v. Haitian Centers Council, Inc.
509 U.S. 155 (1993) 21

Talbot v. Seeman
5 U.S. 1 (1801) 17

Thompson v. Oklahoma
487 U.S. 815 (1988) 24

Trans World Airlines, Inc. v. Franklin Mint Corp.
466 U.S. 243 (1983) 18, 19

Tucker v. Alexandroff
183 U.S. 424 (1902) 19

United States v. Palestine Liberation Organization
695 F.Supp. 1456 (S.D.N.Y. 1988) 21

United States v. Payne
264 U.S. 446 (1924) 21

Washington v. Glucksberg
521 U.S. 702 (1997) 24

Washington v. Washington Commercial Passenger Fishing Vessel Assn.
443 U.S. 658 (1979) 21

Weinberger v. Rossi
456 U.S. 25 (1982) 19

Wiwa v. Royal Dutch Petroleum Co.
2002 WL 319887 (2002) 7

Xuncax v. Gramajo
886 F. Supp. 162 (D. Mass. 1995) 7

U.S. CONSTITUTION AND FEDERAL STATUTES

7 U.S.C. § 1733 7

8 U.S.C. § 1226(c) 1, 2, 22, 26

22 U.S.C. § 262d 7

22 U.S.C. § 2151n(a) 7

22 U.S.C. § 2304 7

TREATIES AND OTHER INTERNATIONAL DOCUMENTS

African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5 ..... 12, 13

American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 ..... 11, 12, 15

American Declaration of the Rights and Duties of Man, May 2, 1948, OAS Doc. OEA/Ser.L/V/II.65, Doc. 6 12

Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173 (Dec. 9, 1988) 9

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 ..... 12, 13-14

International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ..... passim

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) 8, 9, 10

MISCELLANEOUS

3 GAOR, Pt. I, Third Comm. 247, 248 (1948) 9

A. v. Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997) 5

Al-Nashif v. Bulgaria, Application No. 50963/99 (June 20, 2002) 13

William Blackstone, IV *Commentaries on the Laws of England* 424 (photo reprint. 1978) (1783) 3

Ian Brownlie, *Principles of Public International Law* 48-50 (4th ed. 1990) 16

Caballero v. United Kingdom, Application No. 32819/96 (Feb. 8, 2000) 14

Case Concerning United States Diplomatic and Consular Staff in Tehran, (United States v. Iran) 1980 I.C.J. 3, 42 8

Committee against Torture, Consideration of Reports Submitted By States Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000) 23-24

The Declaration of Independence para. 1 (U.S. 1776) .. 23

Executive Order, No. 13107, 63 FR 68991 (Dec. 10, 1998) 3, 22

The Federalist No. 78 , (Alexander Hamilton) (Clinton Rossiter ed., 1961) 23

Gimenez v. Argentina, Case 11.245, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 33 (1996) 14

Ruth Bader Ginsburg and Deborah Jones Merritt, "Affirmative Action: An International Human Rights Dialogue," 21 *Cardozo Law Review* 253, 282 (1999) 26

Hammel v. Madagascar, Communication No. 155/1983, U.N. Doc. Supp. No. 40 (A/42/40) at 130 (1987) 5

H.L.A. Hart, *The Concept of Law* (1961) 24

Parvez Hassan, "The Word 'Arbitrary' As Used in the Universal Declaration of Human Rights: 'Illegal' Or 'Unjust?,'" 10 *Harvard International Law Journal* 225 (1969) 9

R.H. Helmholz, "Magna Carta and the Ius Commune," 66 *University of Chicago Law Review* 297 (1999) . . . 3

Louis Henkin, *Foreign Affairs and the U.S. Constitution* (2d ed. 1996) 16

Louis Henkin et al., *Human Rights* 286 (1999) 9

Louis Henkin, *The Age of Rights* (1990) 23

Louis Henkin, "A Decent Respect to the Opinions of Mankind," 25 *John Marshall Law Review* 215 (1992) 26

Michael and Brian Hill v. Spain, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (1997) 6

Oliver Wendell Holmes, Jr., *The Common Law* (1886) . 24

Human Rights Committee, General Comment No. 8, in Report of the Human Rights Committee, Human Rights Committee, U.N. GAOR, 37th sess., Supp. No. 40, Annex V, at 95 (1982) 4

Human Rights Committee, General Comment No. 29 (2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) 4-5

Vicki C. Jackson, "Narratives of Federalism: Of Continuities and Comparative Constitutional Experience," 51 *Duke Law Journal* 223 (2001) 26

Harold Hongju Koh, "Edward L. Barrett Jr. Lecture on Constitutional Law," 35 *University of California Davis Law Review* 1085 (2002) 26

Gerald L. Neuman, "Habeas Corpus, Executive Detention, and the Removal of Aliens," 98 *Columbia Law Review* 961 (2000) 27

Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1993) 4

Sandra Day O'Connor, "Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law," 45 *Federal Lawyer* 20 (September 1998) 25

Sandra Day O'Connor, "Federalism of Free Nations," 28 *New York University Journal of International Law and Politics* 35, 39 (1995-96) 21, 25

Jordan Paust, Joan Fitzpatrick, and Jon Van Dyke, *International Law and Litigation in the U.S.* (2000) 8

Proclamation of Bill of Rights Day, Human Rights Day and Week, Dec. 9, 1983, U.S. Dep't of State, Selected Documents No. 22 (December 1983) 8

William Rehnquist, "Constitutional Courts - Comparative Remarks," *in Germany and its Basic Law: Past, Present and Future* (Paul Kirchhof & Donald P. Kommers eds., 1993) 25

Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/57/173 (2002) 11

Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44 (1997) 10

Restatement (Third) of the Foreign Relations Law of the United States (1987) 7, 15, 16

Mark Tushnet, "The Possibilities of Comparative Constitutional Law, 108 *Yale Law Journal* 1225 (1999) 26

U.N. Commission on Human Rights Res. 1991/42 (1991) 10

United Nations, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* (1964) 9

U.S. Department of State, II Country Reports on Human Rights Practices for 1998 (1999) 7

Van Alphen v. The Netherlands, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990) 6

INTEREST OF THE AMICI CURIAE

This Brief of *Amici Curiae* is respectfully submitted by several international human rights organizations in support of Hyung Joon Kim ("Respondent"), who argues that he may not be detained without charge and with no opportunity to challenge the reasonableness of his detention.[1] *Amici* recognize that all individuals, including aliens, are entitled to the protection of their fundamental rights. Such rights include the prohibition against arbitrary detention and the concomitant right of judicial review to challenge the lawfulness and justness of detention.

SUMMARY OF ARGUMENT

International law places strict limits on the power of states to detain individuals. Detention cannot be arbitrary and must serve a legitimate purpose. Thus, detention without charge, with no right to bail, and where the detainee poses no flight risk or danger to the public violates international law.

Under 8 U.S.C. § 1226(c), Respondent is not provided with any opportunity to challenge the reasonableness of his detention.[2] He is provided no opportunity to make bail.

---

[1] *Amici* state that no party or its counsel has authored this Brief in whole or in part nor has any person or entity other than *Amici* and their counsel made any monetary contribution to its preparation. Both parties have consented to the filing of this Brief. Letters of consent have been lodged with the Clerk of the Court.

[2] *Amici* acknowledge that the United States may deport certain aliens or detain them temporarily when they pose a flight risk or danger to the public. In this case, however, *Amici* argue that the United States may not detain an alien without charge, with no right to bail, and where the detainee poses no flight risk or danger to the public.

Moreover, the Government cannot support his detention based on legitimate immigration purposes. He is not serving a criminal sentence nor has he been charged with a crime. There is no reason to believe that the Respondent poses a risk of flight or danger to the public. Accordingly, Respondent's detention falls within the international prohibition against arbitrary detention.

International law is an integral part of United States law. Moreover, it is a well-known canon of statutory construction that federal law must not be interpreted to violate international law if any other construction is fairly possible. In the present case, 8 U.S.C. § 1226(c) can readily be interpreted in a manner consistent with international law. In addition, the United States has always accorded "a decent respect to the opinions of mankind." As this Court examines the permissibility of the mandatory detention scheme set forth in 8 U.S.C. § 1226(c), it should also inform its analysis by reference to international and foreign law.

ARGUMENT

I.
ARBITRARY DETENTION VIOLATES INTERNATIONAL LAW

Few concepts are more fundamental to the principle of ordered liberty than the right to be free from detention in the absence of incarceration pending trial or other disposition of a criminal charge. This fundamental principle of human rights can be traced to the seminal document on personal liberty and civil governance – the Magna Carta. The Magna Carta was drafted in 1215 to check the abuse of power manifested by the English monarchy. In particular, Chapter 39 proclaimed that "[n]o free man shall be taken, imprisoned,

disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."[3] *See generally* R.H. Helmholz, "Magna Carta and the Ius Commune," 66 *University of Chicago Law Review* 297 (1999).

Since its affirmation in the Magna Carta, the prohibition against arbitrary detention has become a recognized component of the due process of law. It is an integral part of the constitutional protections recognized in the Due Process Clause of the Fifth Amendment. It has been affirmed in national constitutions throughout the world. Equally significant, it has also been recognized by virtually every multilateral and regional human rights instrument.

A. The International Covenant on Civil and Political Rights Prohibits Arbitrary Detention

The International Covenant on Civil and Political Rights ("ICCPR"), which was ratified by the United States in 1992, formally codifies the prohibition against arbitrary detention and the concomitant requirement of judicial review.[4]

---

[3] As noted by Blackstone in his *Commentaries on the Laws of England*, Chapter 39 alone merited the title of the Great Charter. William Blackstone, IV *Commentaries on the Laws of England* 424 (photo reprint. 1978) (1783).

[4] As of October 1, 2002, there are 148 States Parties to the ICCPR. In December 1998, President Clinton forcefully reasserted the U.S. commitment to the ICCPR by issuing Executive Order, No. 13107, 63 FR 68991 (Dec. 10, 1998). According to Section 1(a) of the Executive Order, "[i]t shall be the policy and practice of the United States, being committed to the protection and promotion of human rights and fundamental

International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. For example, Article 9(1) provides that "[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." According to the *travaux préparatoires*, the term "arbitrary" meant far more than "illegal." Cases of deprivation of liberty provided for by law must not be disproportionate, unjust, or unpredictable. Thus, "[i]t is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily." Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 172 (1993). To protect against such arbitrary deprivations of liberty, Article 9(4) provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

The Human Rights Committee, established to monitor compliance with the ICCPR, has stated that Article 9 is applicable to all deprivations of liberty. *See* Human Rights Committee, General Comment No. 8, in Report of the Human Rights Committee, Human Rights Committee, U.N. GAOR, 37th sess., Supp. No. 40, Annex V, at 95 (1982). Indeed, the right to initiate judicial proceedings to challenge the lawfulness of detention is so important that it must be respected even during a state of emergency. *See* Human

---

freedoms, fully to respect and implement its obligations under the international human rights agreements to which it is a party, including the [ICCPR] . . ."

Rights Committee, General Comment No. 29 (2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

In several cases, the Human Rights Committee has found a violation of the prohibition against arbitrary detention when aliens have been detained without charge and with no opportunity to challenge the legitimacy of their detention. In *A. v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997), for example, the Human Rights Committee considered whether Australia's blanket policy of detaining aliens pending the determination of their refugee status was inconsistent with the ICCPR. The Committee indicated that a blanket detention policy can be considered arbitrary "if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence . . . ." *Id.* at para. 9.2. The fact of illegal entry alone does not provide sufficient justification for the existence of such a policy. In short, individualized review is necessary to determine the justification for detention. Moreover, detention "should not continue beyond the period for which the State can provide appropriate justification." *Id.* at para. 9.4. In addition, judicial review of such detention is mandated by the ICCPR. In this respect, judicial review of the lawfulness of detention is not limited to a mere determination of compliance with the provisions of domestic immigration law; judicial review must also consider whether the detention is unjust. Moreover, the court must have the power to order release. Because Australia's immigration policy provided no opportunity for a determination of the lawfulness of the detention, the Committee found a violation of Article 9(4). *See also Hammel v. Madagascar*, Communication No. 155/1983, U.N. Doc. Supp. No. 40 (A/42/40) at 130 (1987).

The Human Rights Committee has also recognized that bail should generally be granted in cases of pre-trial detention. In this respect, Article 9(3) of the ICCPR provides that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial . . . ." In *Michael and Brian Hill v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (1997), the Human Rights Committee considered the claim of two British citizens who raised an Article 9(3) violation when Spanish officials refused to grant them release on bail prior to trial. As a preliminary matter, the Committee reaffirmed "its prior jurisprudence that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party." *Id.* at para 12.3. Morever, the mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial. *Id.* In this case, Spain had argued that there was a well-founded concern that the British citizens would leave Spanish territory if released on bail. However, Spain had provided no information justifying this concern and why it could not be addressed by setting an appropriate sum of bail and other conditions of release. "The mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in Article 9, paragraph 3 of the Covenant." *Id.* Accordingly, the Committee found a violation of Article 9(3). *See also Van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990).

In sum, the ICCPR, a treaty signed and ratified by the United States places strict limits on the power of states to detain aliens. First, judicial review must exist to allow

challenges to the legitimacy of any detention scheme. Second, detention must serve a legitimate purpose. Thus, detention without charge, with no right to bail, and where the detainee poses no flight risk or public danger violates the ICCPR. Significantly, the United States ratified the ICCPR without adopting any reservations, understandings, or declarations limiting the scope of these obligations.

B. Customary International Law Prohibits Arbitrary Detention

The prohibition against arbitrary detention is well-recognized in customary international law.[5] The relevant

---

[5] Each branch of the United States Government has recognized the prohibition against arbitrary detention. *See, e.g.*, Executive Branch: U.S. Department of State, II *Country Reports on Human Rights Practices for 1998*, at 1984 (1999) (recognizing arbitrary detention as a human rights abuse); Legislative Branch: 22 U.S.C. § 2151n(a) (No assistance may be given to "the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including . . . prolonged detention without charges."); 7 U.S.C. § 1733, 22 U.S.C. § 262d, 22 U.S.C. § 2304; Judicial Branch: *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, *6 (2002) (arbitrary detention constitutes a "fully recognized violation [] of international law because [it is] inconsistent with the 'inherent dignity and [] the equal and inalienable rights of all members of the human family.'"); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1992) ("there is a clear international prohibition against arbitrary arrest and detention"); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541-42 (N.D. Ca. 1987).

The Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987) also recognizes the prohibition against arbitrary detention. ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged, arbitrary detention. . . ." In turn, "[d]etention is arbitrary if it is not pursuant to law; it may be arbitrary also if "it is incompatible with the principles of justice

sources of customary international law include treaties, General Assembly resolutions, statements of relevant U.N. agencies, decisions of international and regional tribunals, and other forms of state practice. *See generally* Jordan Paust, Joan Fitzpatrick, and Jon Van Dyke, *International Law and Litigation in the U.S.* 82-99 (2000). *Cf. The Paquete Habana* 175 U.S. 677 (1900).

The Universal Declaration of Human Rights is the most well-recognized and respected elaboration of international human rights norms of the twentieth century. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). The Universal Declaration of Human Rights is recognized to embody the rules of customary international law in the realm of human rights.[6] *See generally*

---

or with the dignity of the human person." [citation omitted]." *Id.* at § 702 cmt. (h). Indeed, the Restatement (Third) § 702 cmt. (n) recognizes that the prohibition against arbitrary detention has attained the status of *jus cogens*, a nonderogable norm that is binding on all states.

The United States has denounced arbitrary detention before the International Court of Justice. In the *Iranian Hostages* case, the United States Government argued to the International Court of Justice that arbitrary detention of U.S. nationals by Iranian militants constituted a gross violation of international law. Significantly, the International Court of Justice agreed. "[T]o deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." *Case Concerning United States Diplomatic and Consular Staff in Tehran*, (United States v. Iran) 1980 I.C.J. 3, 42.

[6] As noted by President Reagan in 1983, "the Universal Declaration remains an international standard against which the human rights practices of all governments can be measured." Proclamation of Bill of Rights Day, Human Rights Day and Week, Dec. 9, 1983, U.S. Dep't of State, Selected Documents No. 22 (December 1983).

Louis Henkin et al., *Human Rights* 286 (1999). Article 9 of the Universal Declaration of Human Rights provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile." According to the *travaux préparatoires*, the term "arbitrary" was meant to protect individuals against both illegal and unjust laws.[7] *See generally* Parvez Hassan, "The Word 'Arbitrary' As Used in the Universal Declaration of Human Rights: 'Illegal' Or 'Unjust?,'" 10 *Harvard International Law Journal* 225 (1969). Therefore, even an arrest or detention implemented pursuant to an existing but unjust law could be categorized as "arbitrary."[8]

Several U.N. organizations have affirmed the prohibition against arbitrary detention.[9] For example, the United Nations

---

[7] As noted by the delegate from the United Kingdom, the article would lose greatly if the word "arbitrary" was deleted. "There might be certain countries where arbitrary arrest was permitted. The object of the article was to show that the United Nations disapproved of such practices. National legislation should be brought into line with the standards of the United Nations. Rights should not derive from law, but law from rights." 3 GAOR, Pt. I, Third Comm. 247, 248 (1948).

[8] In 1964, the United Nations prepared a study on the right to be free from arbitrary arrest, detention, and exile. The study affirmed that the term "arbitrary" was not synonymous with "illegal" and that "the former signifies more than the latter." United Nations, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* 7 (1964). Accordingly, "[a]n arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of the person." *Id.*

[9] See also Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173 (Dec. 9, 1988) ("Principle 2: Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose." Principle 11: A person shall not be kept in detention without being given an effective opportunity

established the Working Group on Arbitrary Detention in 1991 to investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards. *See* U.N. Commission on Human Rights Res. 1991/42 (1991). The Working Group has established the following three categories for considering cases of arbitrary detention:

> (A) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (Category I);
> (B) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, .8, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II)
> (C) When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character. (Category III).

See Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44 (1997).

---

to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or be assisted by counsel as prescribed by law.").

The United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has recognized the essential nature of judicial review and its status under international law. *See* Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/57/173 (2002). The Special Rapporteur has made such findings in the context of immigration proceedings. According to the Special Rapporteur, "[j]udicial control of interference by the executive power with the individual's right to liberty is an essential feature of the rule of law." *Id.* at para. 15. Canvassing various sources of international law, including U.N. instruments and the work of regional bodies, the Special Rapporteur concluded that judicial review applies to all forms of deprivation of liberty, including administrative detention and immigration control measures. *Id.* at para. 17.

In addition to U.N. practice, each of the regional human rights systems recognize the prohibition against arbitrary detention and its concomitant requirement of judicial review. *See* American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (Art. 7(3): "No one shall be subject to arbitrary arrest or imprisonment." Article 7(5): "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released with prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial." Article 7(6): "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if

the arrest or detention is unlawful.");[10] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (Art. 5(1): "Everyone has the right to liberty and security of the person." Article 5(4): "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.");[11] African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5 (Art. 6: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." Art. 7(1): "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating

---

[10] As of October 1, 2002, there are 25 States Parties to the American Convention on Human Rights. The United States has signed the American Convention.

In addition, the American Declaration of the Rights and Duties of Man, which expresses the obligations of the United States as a member of the Organization of American States, also recognizes the prohibition against arbitrary detention. American Declaration of the Rights and Duties of Man, May 2, 1948, OAS Doc. OEA/Ser.L/V/II.65, Doc. 6 (Article XXV: "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. . . . Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay, or otherwise, to be released.").

[11] As of October 1, 2002, there are 44 States Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; . . . .").[12]

The European Court of Human Rights, which is authorized to review compliance with the European Convention on Human Rights, has found that detaining aliens without charge under a mandatory detention scheme and with no opportunity to challenge the legitimacy of detention violates the prohibition against arbitrary detention. In *Al-Nashif v. Bulgaria*, Application No. 50963/99 (June 20, 2002), the European Court considered whether Bulgaria's mandatory detention of aliens in cases of national security constituted arbitrary detention under Article 5(4) of the European Convention. Under Bulgaria's immigration law, judicial review was unavailable to such detainees. As a preliminary matter, the Court noted that "everyone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court, regardless of the length of confinement." *Id.* at para. 92. Judicial review is necessary for "both the protection of the physical liberty of individuals as well as their personal liberty." *Id.* Thus, individuals "should have access to a court and the opportunity to be heard either in person or through some form of representation." *Id.* Significantly, the Court indicated that national authorities cannot simply dismiss the right of judicial review. The Court thus found that the Bulgarian mandatory detention scheme was inconsistent with the prohibitions against arbitrary detention set forth in European Convention.

The European Court has also recognized that bail should generally be granted in cases of pre-trial detention. In these cases, the Court has applied Article 5(3) of the European

---

[12] As of October 1, 2002, there are 52 States Parties to the African Charter on Human and Peoples' Rights.

Convention, which provides that "[e]veryone arrested or detained . . . shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial." In *Caballero v. United Kingdom*, Application No. 32819/96 (Feb. 8, 2000), the applicant was detained without bail pending trial pursuant to the Criminal Justice and Public Order Act, which provided for automatic denial of bail. In its own submissions to the Court, the United Kingdom acknowledged that the automatic denial of bail constituted a violation of Article 5(3). The Court agreed, finding a violation of the European Convention. *Id.* at para 21.

The Inter-American Commission on Human Rights, which is authorized to monitor compliance with the American Convention on Human Rights, has recognized the impermissibility of mandatory detention schemes and that bail should generally be granted in cases of pre-trial detention. In *Gimenez v. Argentina*, Case 11.245, Report No. 12/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 33 (1996), the Inter-American Commission considered whether the applicant's pre-trial detention without bail constituted a violation of Article 7(5) of the American Convention. While states may impose restrictions on pre-trial release, the Commission indicated that preventive detention is an exceptional measure and should only be applied "in cases where there exist a reasonable suspicion that the accused will either evade justice or impede the preliminary investigation by intimidating witnesses or otherwise destroying evidence." *Id.* at para. 84. The Commission indicated that determinations for pre-trial release must consider the following factors: (1) danger of flight, seriousness of the crime, and the potential severity of the sentence; (2) risk of repetition of offenses; and (3)

personal circumstances. Reviewing each factor, the Commission concluded that Argentina had failed to establish that pre-trial detention was necessary. Accordingly, the Commission found a violation of Article 7(5) of the American Convention.

In the present case, the Respondent is provided with no opportunity to challenge the reasonableness of his detention. The denial of bail is automatic. In addition, Respondent's detention serves no legitimate purpose. He is not serving a criminal sentence nor has he been charged with a crime for which he is being detained. Moreover, there is no reason to believe that the Respondent poses a risk of flight or danger to the public. Accordingly, Respondent's detention falls within the prohibition against arbitrary detention. It is "incompatible with the principles of justice or with the dignity of the human person." *Restatement (Third) of the Foreign Relations Law of the United States* § 702 cmt (h) (1987) ("*Restatement (Third)*").

II.
FEDERAL LAW MUST BE INTERPRETED IN A MANNER CONSISTENT WITH INTERNATIONAL LAW WHEN POSSIBLE

It is a well-known doctrine of statutory construction that federal law must not be interpreted in such a manner as to violate international law if any other construction is fairly possible. According to the authoritative *Restatement (Third)* § 114, "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with

an international agreement of the United States.[13] Applying this rule to cases where there is a conflict between international law and domestic practice, the *Restatement (Third)* § 115(1)(a) indicates that "[a]n Act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled." Recognizing the important status of international law in the United States, federal courts have demanded an expression of clear intent before they will conclude that Congress intended to supercede international law in any of its statutes.[14] *See also* Louis Henkin, *Foreign Affairs and the U.S. Constitution* 486 (2d ed. 1996). This process does not require courts to use international law as a means of overriding domestic law; rather, courts are urged to harmonize domestic and international law whenever possible.

In *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), the Supreme Court considered whether an Act of Congress adopted to suspend trade between the United States and France authorized the seizure of neutral vessels, an action that would violate customary international law. Writing for the Supreme Court, Chief Justice Marshall enunciated a doctrine of statutory construction that affirmed the importance of international law in the United States.

---

[13] The phrase "where fairly possible" derives from one of the principles of interpretation designed to avoid serious doubts as to the constitutionality of a federal statute that was set forth by Justice Brandeis in *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936). *Restatement (Third)*, § 114 rpt. n. 2.

[14] This doctrine is not unique to American jurisprudence. *See* Ian Brownlie, *Principles of Public International Law* 48-50 (4th ed. 1990).

> It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.
>
> These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.[15]

Id. at 118. In light of these principles, Chief Justice Marshall concluded that the Act of Congress did not apply to neutral vessels.

Since its elaboration in *Murray v. Schooner Charming Betsy*, this doctrine of statutory construction has been extended to treaties. In *Chew Heong v. United States*, 112 U.S. 536 (1884), the Supreme Court considered whether immigration restrictions adopted by Congress pursuant to the Chinese Restriction Act were inconsistent with a treaty entered into between the United States and China. Writing for the Court, Justice Harlan acknowledged the importance of treaties and recognized the profound implications that arise when a country violates an international obligation.

---

[15] The Supreme Court's decision in *Talbot v. Seeman*, 5 U.S. 1 (1801) represents the first elaboration of this principle of statutory construction. In *Talbot*, Chief Justice Marshall indicated that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." *Id.* at 43.

> Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.

Id. at 539. Reviewing the treaty language and subsequent federal legislation, Justice Harlan refused to override the treaty language absent explicit congressional authorization.

Throughout its case law, the Supreme Court has emphasized that it will not interpret statutory provisions to conflict with international law, particularly in the absence of clear congressional intent, if any other construction is fairly possible. In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1983), for example, the Supreme Court considered whether Congress had sought to override the provisions of the Warsaw Convention by adopting the Par Value Modification Acts. Writing for the Court in an 8-1 ruling, Justice O'Connor indicated that "[t]here is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action." *Id.* at 252. Justice O'Connor found it significant that Congress had not specifically referenced the Warsaw Convention in its deliberations concerning the Par Value Modification Acts. "Legislative silence is not sufficient to abrogate a treaty. [citation omitted] Neither the legislative

histories of the Par Value Modification Acts, the history of the repealing Act, nor the repealing Act itself, make any reference to the Convention."[16] Id. Accordingly, Justice O'Connor concluded that the treaty provisions remained enforceable in United States courts.

In *Weinberger v. Rossi*, 456 U.S. 25 (1982), the Supreme Court considered whether provisions of the 1947 Military Bases Agreement and the 1968 Base Labor Agreement between the United States and the Philippines were superceded by a 1971 federal statute on employment discrimination. Writing for a unanimous Court, then-Justice Rehnquist reaffirmed the maxim of statutory construction established in *Murray v. Schooner Charming Betsy*. *Id.* at 32. Accordingly, "some affirmative expression of congressional intent to abrogate the United States' international obligations is required ...." *Id.* Reviewing the legislative history of the federal statute, then-Justice Rehnquist found no support whatsoever for the conclusion that Congress intended in some

---

[16] While Justice Stevens dissented from the Court's ruling, he did not disagree with Justice O'Connor's analysis of *Murray v. Schooner Charming Betsy*. Indeed, Justice Stevens reiterated the importance of ensuring that treaty interpretation in domestic courts does not violate the terms of the treaty. "Constructions of treaties yielding parochial variations in their implementation are anathema to the *raison d'etre* of treaties, and hence to the rules of construction applicable to them." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. at 263 (Stevens, J. dissenting). *See also Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) ("It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended."); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902).

way to limit the scope of the agreements. *Id.* at 33. Accordingly, then-Justice Rehnquist concluded that the international agreements were not superseded by the subsequent federal legislation.

In the most recent elaboration of the *Charming Betsy* doctrine issued by the Supreme Court, Justice Scalia, in a dissenting opinion joined by Justices O'Connor, Kennedy, and Thomas, reaffirmed the validity of this canon of statutory construction. *See Hartford Fire Insurance Co., v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting). In determining the extraterritorial reach of the Sherman Act, Justice Scalia acknowledged the relevance of international law in statutory construction. "It is relevant to determining the substantive reach of a statute because 'the law of nations,' or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. [citation omitted] Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe." *Id.* at 815. Significantly, Justice Scalia indicated that "even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Id.*

While this doctrine of statutory construction is steeped in the principle of comity, it is also influenced by foreign policy concerns. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963), the Supreme Court applied this doctrine to avoid negative foreign policy implications. Specifically, the Court refused to construe the National Labor Relations Act in a manner contrary to State Department regulations because such a construction would have foreign policy implications. The Court also relied on the

fact that the proposed construction would have been contrary to a "well-established rule of international law." *Id.* at 21. *See also Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957).

This doctrine of statutory construction is not an historical anomaly or isolated extrapolation – it is a longstanding doctrine of statutory construction that has been affirmed by the U.S. Supreme Court in numerous decisions. *See also Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993); *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-413 (1968); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *Cook v. United States*, 288 U.S. 102, 120 (1933); *United States v. Payne*, 264 U.S. 446, 448-449 (1924); *Brown v. United States*, 12 U.S. 110, 125 (1814).[17] The *Charming Betsy* doctrine is based upon comity, a respect for other nations, and the law that binds the international community. As noted by Justice O'Connor, "[o]ur membership in the family of civilized nations demands no less than this reciprocal recognition of rights and responsibilities . . . ." Sandra Day O'Connor, "Federalism of Free Nations," 28 *New York University Journal of International Law and Politics* 35, 39 (1995-96). The *Charming Betsy* doctrine is also based upon the recognition that violations of international law, unlike violations of

---

[17] Lower courts have also applied this canon of statutory construction on countless occasions. *See, e.g., United States v. Palestine Liberation Organization*, 695 F.Supp. 1456, 1464 (S.D.N.Y. 1988) ("Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence.").

domestic law, can have profound foreign policy consequences. Accordingly, courts should be particularly cautious when engaging in statutory construction that may affect issues of international law.

In the present case, the statute under which Respondent was being held, 8 U.S.C. § 1226(c), contains no clear statement purporting to violate the international norm against arbitrary detention. Moreover, the statute can be interpreted in a manner that does not violate international law. For example, 8 U.S.C. § 1226(c) can be interpreted as not applying to lawful permanent residents unless a final administrative removal order has been issued. This interpretation would not subject Respondent to arbitrary detention in violation of international law.[18]

This approach is consistent with international law. From U.S. ratification of the ICCPR to the adoption of Executive Order, No. 13107, the United States is fully committed to the protection and promotion of human rights and fundamental freedoms, including the prohibition against arbitrary detention. In the absence of a government act that clearly and unequivocally states an intention to supersede the prohibition against arbitrary detention, this Court should interpret 8 U.S.C. § 1226(c) in a manner consistent with United States obligations under international law.

---

[18] Even if another construction of 8 U.S.C. § 1226(c) could be found to violate international law, such construction is not presented in this case. *See Jones v. United States*, 529 U.S. 848, 860 (2000) (Thomas, J., concurring).

III.
U.S. COURTS SHOULD INFORM THEIR ANALYSIS BY REFERENCE TO INTERNATIONAL AND FOREIGN PRACTICE

The United States has a long tradition of providing "a decent respect to the opinions of mankind." *The Declaration of Independence* para. 1 (U.S. 1776). This practice is not designed to override domestic law; rather, it seeks to inform the interpretation and understanding of our core values, such as due process and fundamental fairness.

Indeed, this tradition can be traced to the earliest days of our nation's history. Both the Declaration of Independence and the United States Constitution were influenced by numerous sources of law, both foreign and international. The Declaration of Independence, for example, refers to providing "a decent respect to the opinions of mankind." And it was only through such comparative analysis that the drafters of these documents were able to distill such concepts as "unalienable Rights." *See* Louis Henkin, *The Age of Rights* (1990). *The Federalist Papers* are also replete with references to both foreign practice and the law of nations. *See, e.g., The Federalist No. 78*, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Many Supreme Court rulings have engaged in such comparative methodology.[19] In *Atkins v. Virginia*, 122 S.Ct.

---

[19] The U.S. Department of State has also recognized the relevance of international law for purposes of judicial inquiry. Indeed, "[e]ven when a treaty is 'non-self-executing,' courts may nonetheless take notice of the obligations of the United States thereunder in an appropriate case and may refer to the principles and objectives, thereof, as well as to the stated policy reasons for ratification." Committee against Torture, Consideration of Reports Submitted By States Parties Under Article 19 of the

2242 (2002), for example, the Supreme Court referenced, albeit briefly, international practice. In determining whether the execution of mentally retarded defendants violated the Eighth Amendment, the Court noted the overwhelming disapproval of the world community in the imposition of the death penalty for crimes committed by mentally retarded offenders. *Id.* at 2249. The Court added that such evidence was not dispositive in its interpretation of the Eighth Amendment. It noted, however, that the consistency of these views with the legislative evidence "lends further support to our conclusion that there is a consensus among those who have addressed the issue." *Id. See also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (Breyer, J., concurring) (referencing the practice of constitutional courts in other countries); *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting) (referencing the practice of foreign courts and international institutions); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (referencing the practice of Western democracies); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (O'Connor, J., concurring) (referencing international agreements); *Miranda v. Arizona*, 384 U.S. 436 (1966) (referencing the practice of common law countries).

Several members of this Court have acknowledged the relevance and benefits of such comparative methodology.[20] Justice O'Connor, for example, has remarked that "American judges and lawyers can benefit from broadening our horizons

---

Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000), at para. 57.

[20] In his seminal work *The Common Law*, Justice Holmes referenced numerous foreign sources in his efforts to explain the nature of American jurisprudence. *See* Oliver Wendell Holmes, Jr., *The Common Law* 2, 7 (1886). For a similar approach, *see* H.L.A. Hart, *The Concept of Law* 246-47 (1961).

. . . and looking beyond American borders in our search for persuasive legal reasoning." Sandra Day O'Connor, "Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law," *International Judicial Observer* (June 1997), at 2. There is, in fact, ample precedent for such practice. Moreover, Justice O'Connor recognized the critical function of comparative methodology in maintaining the salience of our legal system. "The vibrancy of our American-Anglo legal culture has stemmed, in large part, from its dynamism, from its ability to adapt over time. Our flexibility, our ability to borrow ideas from other legal systems, is what will enable us to remain progressive with systems that are able to cope with a rapidly shrinking world." *Id.* at 3. Thus, Justice O'Connor remarked that "[w]e should keep our eyes open for innovations in foreign jurisdictions that, with some grafting and pruning, might be transplanted to our own legal system."[21] *Id.* Chief Justice Rehnquist has noted that it is appropriate for United States courts to "begin looking to the decisions of other constitutional courts to aid in their own deliberative process." William Rehnquist, "Constitutional Courts - Comparative Remarks," *in Germany and its Basic Law: Past, Present and Future* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993). Justice Ginsburg has echoed these views in her own writings.

---

[21] Justice O'Connor has recognized the benefits of considering both foreign and international law. *See* O'Connor, "Federalism of Free Nations," at 41 ("Just as our domestic laws develop through a free exchange of ideas among state and federal courts, so too should international law evolve through a dialogue between national courts and transnational tribunals and through the interdependent effect of their judgments. . . . As our domestic courts are increasingly asked to resolve disputes that involve questions of foreign and international law about which we have no special competence, I think there is great potential for our Court to learn from the experience and logic of foreign courts and international tribunals – just as we have offered these courts some helpful approaches from our own legal traditions.")

> [C]omparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.

Ruth Bader Ginsburg and Deborah Jones Merritt, "Affirmative Action: An International Human Rights Dialogue," 21 *Cardozo Law Review* 253, 282 (1999).

In sum, the United States has a long tradition of reviewing international and foreign practice. *See generally* Harold Hongju Koh, "Edward L. Barrett Jr. Lecture on Constitutional Law: Paying 'Decent Respect' to World Opinion on the Death Penalty," 35 *University of California Davis Law Review* 1085 (2002); Vicki C. Jackson, "Narratives of Federalism: Of Continuities and Comparative Constitutional Experience," 51 *Duke Law Journal* 223 (2001); Mark Tushnet, "The Possibilities of Comparative Constitutional Law," 108 *Yale Law Journal* 1225 (1999); Louis Henkin, "A Decent Respect to the Opinions of Mankind," 25 *John Marshall Law Review* 215 (1992). As this Court examines the permissibility of the mandatory detention scheme set forth in 8 U.S.C. § 1226(c), it should inform its analysis by reference to international and

foreign practice.[22] Such practice is uniform in its prohibition against arbitrary detention.

---

[22] Because the Supreme Court derives its notions of sovereign authority over aliens from international law, it is also worth considering international law to identify limitations on sovereign authority. *Cf.* Gerald L. Neuman, "Habeas Corpus, Executive Detention, and the Removal of Aliens," 98 *Columbia Law Review* 961, 1046 (2000).

CONCLUSION

The prohibition against arbitrary detention is a core constitutional value that is recognized and affirmed under international law. The Ninth Circuit's decision affirms this core value. For these reasons, *Amici* respectfully submit this Brief and urge the Court to affirm the Ninth Circuit's ruling.

October 26, 2002 Respectfully Submitted,

_____

William J. Aceves

William J. Aceves
Professor of Law
California Western School of Law
225 Cedar Street
San Diego, CA 92101
(619) 515-1589

Joan Fitzpatrick
Professor of Law
University of Washington
School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 543-9368

Paul L. Hoffman
Schonbrun, De Simone, Seplow,
Harris & Hoffman
723 Ocean Front Walk
Venice, CA 90291
(310) 396-0731

Supreme Court, U.S.
FILED
OCT 28 2002
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

No. 01-1491

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
Petitioner,

v.

HYUNG JOON KIM,
Respondent.

BRIEF FOR *AMICI CURIAE* LAW FACULTY IN SUPPORT OF RESPONDENT

On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

---

DANIEL KANSTROOM,
Boston College Law School,
885 Centre Street,
Newton, Massachusetts 02459
617-552-0880
Attorney for *Amici Curiae* Law Professors
[Names of individual *amici* are listed at the conclusion of this brief]

BEST AVAILABLE COPY

TABLE OF CONTENTS

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 11

I. ALL NON-CITIZENS WITHIN THE UNITED STATES ARE PROTECTED BY THE CONSTITUTION WHEN THE GOVERNMENT ACTS TO DETAIN OR TO REMOVE THEM 11

A. The Plenary Power Doctrine Was First Developed in a Largely Discredited Case Involving the Exclusion of Non-citizens 11

B. There is a Well-Recognized Distinction Between the "Plenary Power" of Congress as to Substantive Immigration Laws and the Constitutional Limits on that Power to Detain Individuals Within the United States 16

II. THIS COURT HAS APPLIED THE PLENARY POWER DOCTRINE TO THE DETENTION OF LAWFULLY ADMITTED PERMANENT RESIDENTS DURING REMOVAL PROCEEDINGS TO A MUCH LESSER EXTENT THAN TO NON-CITIZENS SEEKING ADMISSION 23

III. THE PLENARY POWER DOCTRINE DERIVES FROM THE COURT'S

RECOGNITION OF THE EXECUTIVE'S AUTHORITY OVER FOREIGN AFFAIRS, A CONSIDERATION WITH VIRTUALLY NO RELEVANCE TO THIS CASE **26**

IV. CONCLUSION **28**

TABLE OF AUTHORITIES

FEDERAL CASES

Addington v. Texas, 441 U.S. 418 (1979) 19

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 16

Baker v. Carr, 369 U.S. 186 (1962) 26

Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir.; en banc), cert. denied, 516 U.S. 976 (1995) 27

Bridges v. Wixon, 326 U.S. 135 (1945) 10, 21

Carlson v. Landon, 342 U.S. 524 (1952) 22, 23

Chae Chan Ping v. United States (The Chinese Exclusion Case) 130 U.S. 581 ..... 5, 11, 13 26

Chowdhury v. INS, 249 F.3d 970 (9th Cir. 2001) 9

Ekiu v. United States, 142 U.S. 651 (1892) 11, 12

Fiallo v. Bell, 430 U.S. 787 (1977) 26

Fong Yue Ting v. United States, 149 U.S. 698 (1893) ... 14, 15

Foucha v. Louisiana, 504 U.S. 71 (1992) 18

Galvan v. Press, 347 U.S. 522 (1954) 17

Gisbert v. U.S. Attorney General, 988 F.2d 1437 (5th Cir. 1993) 27

INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) 26, 27

INS v. Chadha, 462 U.S. 919 (1983) 27

INS v. St. Cyr, 533 U.S. 289 (2001) 9

Jackson v. Indiana, 406 U.S. 715 (1972) 19

Jean v. Nelson, 472 U.S. 846 (1985) 17

Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) aff'd, 472 U.S. 846 ..... 14, 27

Johnson v. Eisentrager, 339 U.S. 763 (1950) 10, 21

Kamalthas v. INS, 251 F.3d 1279 (9th Cir. 2001) 9

Kansas v. Hendricks, 521 U.S. 346 (1997) 18

Kleindienst v. Mandel, 408 U.S. 753 (1972) 26

Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) 27

Landon v. Plasencia, 459 U.S. 21 (1982) 8, 9, 13, 24

Leng May Ma v. Barber, 357 U.S. 185 (1958) 24

Lochner v. New York, 198 U.S. 45 (1905) 5

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). 3, 24

Plessy v. Ferguson, 163 U.S. 567 (1896) 5

Plyler v. Doe, 457 U.S. 202 (1982) 19

Reid v. Covert, 354 U.S. 1 (1957) 13

Reno v. Flores, 507 U.S. 292 (1993) 22, 23, 24

Sareang Ye v. INS, 214 F.3d 1128 (9th Cir. 2000) 9

Scott v. Sanford, 60 U.S. 393 (1856) 5

Shaugnessy v. Mezei, 345 U.S. 206 (1953) 9, 14, 18, 21, 26

United States v. Salerno, 481 U.S. 739 (1987) 3, 4, 7, 18,21

United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) 29

United States v. Hare, 873 F.2d 796 (5th Cir. 1989) 18

United States v. Theron, 782 F.2d 1510 (10th Cir. 1986) 18

Wong Wing v. United States, 163 U.S. 228 (1896) 4, 15, 16, 17, 19

Yamataya v. Fisher, 189 U.S. 86 (1903) 5, 20,21

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 4, 16, 20, 22

Zadvydas v. Davis, 533 U.S. 678 (2001) 4, 9, 10, 19, 21

STATUTES & REGULATIONS

Art. I, § 2, cl. 2 21

Art. I, § 3, cl. 3 21

Art. I, § 1, cl. 5 21

8 U.S.C. § 1101(a) 2, 11, 25, 28

8 U.S.C. § 1182(a) 2, 8

8 U.S.C. § 1226(c) 2, 4, 8, 9, 17, 22

8 U.S.C. § 1227(a) 2

8 U.S.C. § 1231(b) 8

28 U.S.C. § 2241 3

50 U.S.C. § 453 25

8 C.F.R. § 1.1 11

Alien Enemies Act, ch. 66, 1 Stat. 577 23

Alien Friends Act, ch. 58, 1 Stat. 570, 571 (1798) 23

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, 110 Stat. 3009 ..... 2, 5

Sedition Act, ch. 74, 1 Stat. 596 (1798) 23

OTHER AUTHORITIES

T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis, 16 Geo. Imm. L. J. 365* 12

T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 Am. J. Int'l L. 862, 864-69 12

Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny,* 100 Harv.L.Rev. 853, 862 12

David M. Hudson, *Tax Problems for Departing Aliens*, 97-03 Immigration Briefings 1-3 25

Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases,* 113 Harv.L.Rev. 1890 12

Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory,* 16 Geo. Imm. L.J. 413 9

Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power,* 1984 Sup. Ct. REV. 255, 256-78 ..... 5, 12, 28

James Madison, *Report on the Virginia Resolutions*, 4 Debates, Resolutions and Other Proceeding, In Convention on the Adoption of the Federal Constituion556 (Jonathan Elliot, 2d ed., 1836) 6

David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond,* 44 U. Pitt. L. Rev.. 165, 166-80 12

David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas*, 2001 Sup. Ct. Rev. 47 ..... 7, 25

Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation,* 100 Yale L.J. 545 ..... 12, 14

Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive*

Constitutional Rights, 92 Colum.L.Rev. 1625, 1632-50 12

Gerald Neuman, *Strangers to the Constitution*, (Princeton University Press 1996) 12

Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine,* 22 Hastings Const.L.Q. 1087 15

Peter H. Schuck, *The Transformation of Immigration Law,* 84 Colum.L.Rev. 1, 14-18 12

Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. Rev.. 933, 939-951 12

The Kentucky Resolution, Documents of American History 181 (Henry Steele Commanger ed., 6th ed. 1958) 20

8 Annals of Cong. 2012 24

INTEREST OF *AMICI CURIAE*

Amici Curiae are law professors whose individual names appear at the conclusion of this brief. Many of us have written about the principles that the government invokes in this appeal. Although there may be some differences among us about the precise origins and certain aspects of what is generally referred to as "the plenary power doctrine," all conclude that, whatever may be the outer limits of the government's substantive authority to regulate immigration, there is absolutely no question that the removal power of the government, especially the power to detain lawful permanent resident non-citizens, is meaningfully limited by the requirements of due process. *Amici* support affirmance, and write to situate the issues raised by this case within the broader context of constitutional immigration law. In particular, *amici* disagree with the government's contention that judicial deference is appropriate in this case due to the plenary power doctrine.

Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part. The brief was written by counsel for *Amici Curiae* with the assistance of Anaysa Gallardo, Rita Kraner, and Elizabeth Weir, students at Boston College Law School. No one other than *Amici Curiae*, Boston College Law School, or counsel for *Amici Curiae* has made a monetary contribution to the preparation or submission of the brief.

Both Petitioner and Respondent have consented to the filing of this brief. Letters of consent have been lodged with the clerk.

STATEMENT OF THE CASE

Respondent Hyung Joon Kim, a citizen of the Republic of Korea, entered the United States legally as a six year old child in 1984. (Pet. App. 2a). He became a lawful permanent resident of the United States in 1986, at the age of eight. (*Id.* at 31a-32a). A decade later, in 1996, at the age of eighteen, Mr. Kim was convicted of a crime for which he received a suspended sentence. (*Id.* at 32a). In April 1997, he was convicted of "petty theft with priors," and sentenced to three years' in prison. (*Id.*) Despite his long residence, entry as a child, family ties, and various other humanitarian factors, Mr. Kim was charged by the U.S. Immigration and Naturalization Service (INS) with being subject to removal due to his 1997 conviction for an "aggravated felony."[1] (*Id.*). *See* 8 U.S.C. §§ 1101(a)(43)(g), 1227(a)(2)(A)(iii)(2002). He was taken into custody by INS on February 9, 1999. Due to the requirements of 8 U.S.C. 1226(c),[2] INS refused to release him on bond or even to grant him a meaningful bond hearing. (*See* Pet. App. at 33a).

Mr. Kim sought judicial relief in the form of a *habeas corpus* action brought pursuant to 28 U.S.C. § 2241 in the United States District Court for the Northern District of California. (Pet. App. at 2a, 31a, 33a). He challenged § 1226(c) as facially unconstitutional because it precludes an individualized bond hearing in violation of both substantive and procedural guarantees of due process under the Fifth Amendment. The District Court declared §1226(c) unconstitutional on its face and ordered a meaningful, individualized bond hearing at which assessment could be made whether Mr. Kim presented either a flight risk or a danger to the community. (*Id.* at 31a-51a). The district court held specifically that "lawful resident aliens" possess both substantive and procedural due process rights and the § 1226(c) scheme failed on both counts, pursuant to *United States v. Salerno*, 481 U.S. 739, 747 (1987) and *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). (Pet. App. at 39a-50a).

The court of appeals affirmed on the specific ground that § 1226(c) violated due process as applied to Mr. Kim, a lawful permanent resident. (Pet. App. at 30a). The court held that "a lawful permanent resident in removal proceedings cannot constitutionally be deprived of 'a bail hearing with reasonable promptness to determine whether the alien is a flight risk or a danger to the community.' (*Id.* at 30a).

---

[1] In August 2002, Mr. Kim was charged as subject to removal on additional grounds, arising from the 1996 and 1997 convictions. *See* 8 U.S.C. 1227(a)(2)(A)(ii) (stating "two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct.") These additional charges do not affect the constitutional issues presented to the Court in this case. *Amici* also understand that Mr. Kim may contest all asserted grounds in proceedings before the Immigration Court.

[2] The INS detained Mr. Kim pursuant to 8 U.S.C. § 1226(c), part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009. The section as a whole is entitled "Detention of criminal aliens." Section 1226(c)(1) provides, in relevant part,

> "The Attorney General shall take into custody any alien who--
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense."

SUMMARY OF ARGUMENT

The fundamental protections of the Fifth Amendment "are universal in their application, to all persons within the territorial jurisdiction" of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). As this Court has recently noted, "[o]nce an alien enters the country, the legal circumstances change, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis,* 533 U.S. 678, 693 (2001).

The mere fact that a non-citizen has been arrested and charged as 'subject to removal' does not strip a person, even one who may have been convicted of a crime, of the right to be free of unconstitutional detention. *Wong Wing v. United States*, 163 U.S. 228, 236-38 (1896). This is especially true in the case of a lawfully admitted permanent resident with long residence in the United States since childhood and extensive family and community ties, such as the Respondent, Hyung Joon Kim. In our society, liberty is the norm, and detention prior to trial is the carefully limited exception. *United States v. Salerno*, 481 U.S. 739, 755 (1987). This Court has repeatedly confirmed the "general rule" of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial. *Id.* at 749.

Among other arguments made by Petitioners in this case is the general claim that the "policy judgments that Congress made when it enacted § 1226(c) are within its plenary power over the admission and expulsion of aliens and deserve judicial deference." (U.S. Petitioner's Brief at 13, *DeMore v. Kim*, 2002 WL 31016560 (9th Cir. 2002) (No.

01-1491)). This argument -- when applied to this case -- rests upon a series of implicit omissions and fundamental misunderstandings about the so-called 'plenary power doctrine.' It should not be overlooked that the doctrine at the root of Petitioner's deference arguments had its origins in what--apart from *Scott v. Sanford,* 60 U.S. 393 (1856); *Plessy v. Ferguson,* 163 U.S. 567 (1896) and *Lochner v. New York,* 198 U.S. 45 (1905) -- may be the most criticized case in all of U.S. jurisprudence, *Chae Chan Ping v. United States*, (*The Chinese Exclusion Case*) 130 U.S. 581 (1889). That case has been well-described as "a constitutional fossil, a remnant of pre-rights jurisprudence that we have proudly rejected in other respects." Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L.Rev. 853, 862 (1987).[3] While the present case does not require the court to re-examine the plenary power doctrine entirely, a doctrine of such dubious parentage that is so deeply contradictory to the better norms of our constitutional legal system should be invoked, if at all, with great care and in the most limited ways possible. It should certainly not be extended into the realm of constitutional consideration of the mandatory detention of lawful permanent residents.

Indeed, for nearly a century, this Court has recognized the inapplicability of the plenary power doctrine to the procedures of deportation. As this Court noted in *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903), "this court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law.'" The government's assertion that only deferential judicial review is required when detention of non-

[3] Moreover, as one scholar has demonstrated, the doctrine appears to have evolved inadvertently out of misplaced reliance on cases that meant merely to emphasize the power of the federal government. *See generally*, Stephen H. Legomsky, IMMIGRATION AND THE JUDICIARY, (Oxford University Press 1984).

citizens is at issue is an incorrect overgeneralization. (Pet. Br. 14). To the contrary, the doctrine has *never* been held dispositive as to the issue presented by this case: the constitutionality of executive detention of lawful permanent residents within the United States without time limit and without a meaningful individualized hearing. Indeed, to so hold would be to overrule some of the deepest and best constitutional traditions of our nation. As James Madison once noted, "[even if] aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them..." James Madison, *Report on the Virginia Resolutions*, 4 Debates, Resolutions and Other Proceedings, in Convention on the Adoption of the Federal Constitution 556 (Jonathan Elliot, 2d ed. 1836).

More specifically, the government also asserts that, "Congress acted within the scope of its plenary immigration powers" when it used a "categorical approach" in the detention context. (Pet. Br. 14, 32-33). The government suggests that the judiciary should defer to the choices made by the political branches as to mandatory detention of non-citizens. This suggestion overstates both the meaning of the term 'plenary' in the immigration context and the possible significance of a 'categorical approach.' The former is irrelevant in the context of detention of lawful permanent residents and the latter cannot override due process protections. While Congress' substantive judgments about who should be admitted into or deported from the United States may be entitled to deference because of the plenary power doctrine, this deference does not extend in any meaningful way to detention. The Court's immigration detention decisions have reflected essentially the same focus on individualized determinations as have detention decisions in other areas of law. To permit 'categorical' exceptions to due process based solely upon the citizen/non-citizen line would eviscerate over a century of due process precedent and usher in a radical regime of unfettered government power

over millions of legal permanent residents and others within the United States. *See* Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 Hastings Const. L.Q. 1087 (1995) (describing how certain judicial approaches to the detention of aliens have 'infiltrated' other areas of constitutional law).

The plenary power doctrine has also *never* been held dispositive as to the due process protections of persons, such as Mr. Kim, who are lawful permanent residents of the United States. *See generally,* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas*, 2001 Sup. Ct. Rev. 47 (2002) (noting how the mix between concerns of social reality and legal status is intricate and highlighting, "the premier status given in law and social reality to lawful permanent resident status.") Whatever may be the outer boundaries of due process protections, the most basic, long-standing distinction in all of this Court's jurisprudence about the Constitutional status of non-citizens is that between the government's broad authority to determine who may enter the United States versus its more limited power to detain and remove people. The government's interest in detaining people, such as Mr. Kim, who have already been admitted to this country, differs markedly from its stake in refusing to admit large numbers of first-time applicants for admission. The invocation of plenary power by the government in the context of this case is at best a make-weight or a smokescreen. At worst, it is an invitation to an unconscionable retrenchment on the constitutional protection of liberty for all persons within the United States.

Amici are concerned that the government makes rather sweeping generalizations about the relationship between 'plenary power' and individual rights that range from the completely incorrect:

> (an alien who was stopped at the border has no due process claim to be released from detention"

(Pet. Br. at 10).)

But see, *Landon v. Plasencia*, 459 U.S. 21, 41 (1982) (returning lawful permanent residents stopped at the border retain procedural due process protections),

to the hyperbolic:

> ("[a]liens detained under 8 U.S.C. § 1226(c) have committed crimēs that terminate their entitlement to remain in the United States.")

(Pet. Br. 16).

Contrary to this assertion, no administrative order of removal could be entered against Mr. Kim until, at the earliest, an Immigration Judge were to find him subject to removal. That order would not be final until affirmed by the Board of Immigration Appeals (BIA) or until the period for seeking BIA review passed. *See* 8 U.S.C. § 1101(a)(47)(B). Absent a final removal order, Mr. Kim's right to remain in the United States is established as a matter of law. *See* 8 C.F.R. § 1.1(p) ("The term lawfully admitted for permanent residence means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion or deportation.")[4]

[4] Moreover, apart from procedural rights, it is definitively not the law that being charged or even found subject to removal terminates one's lawful residence. First, IIRIRA did not eliminate all avenues of relief for persons subject to §1226(c). A non-citizen convicted of an aggravated felony may be eligible for withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(A), (B). A non-citizen may also receive relief under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001). Second, this Court's recent decision in *INS v. St. Cyr*, 533 U.S. 289 (2001) upheld *habeas corpus* relief for non-citizens subject to removal because of a prior conviction for an aggravated felony conviction. The Court held that discretionary relief under former INA § 212(c) was preserved for a large category of persons removable because of an aggravated felony. The government's assertion that such relief is merely a "matter of grace" significantly undervalues the extensive rule of law attributes of so-called "discretionary" relief from deportation. (Pet. Br. at 38); *see generally*, Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 Geo. Imm. L.J. 413 (2002). Finally, some persons detained under the statute may be able to demonstrate after a full hearing that the conviction for which the INS seeks to remove them was not an aggravated felony. *See, e.g., Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001)(holding that conviction for laundering $1,300 was not an aggravated felony); *Sareang Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000) (holding that state-law offenses of vehicle burglary did not make alien eligible for removal because they were neither "burglaries" nor "crimes of violence" under the INA).

The government also argues that, because § 1226(c) mandates detention in aid of removal (as compared to detention where removal is "no longer practically attainable"), it more directly implicates Congress' "plenary authority over matters of immigration policy" than did the post-final-order detention regime considered in *Zadvydas*. (Pet. Br. at 10). On its face this seems an astonishing assertion: those who are merely accused should have fewer protections than those against whom a final determination has been rendered. It also ignores the two most important limitations on the plenary power doctrine: (1) procedural due process always applies *during* deportation proceedings, *Zadvydas*, 533 U.S. at 693 ("Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law") (quoting *Shaugnessy v. Mezei*, 345 U.S. 206, 212 (1953)); and (2) that lawful permanent residents receive heightened constitutional protection by virtue of their status and ties to the community. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982)("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional

status changes accordingly."); *see also Zadvydas*, 593 U.S. at 694, ([T]he nature of [due process] protection may vary depending upon status and circumstance").[5] Because this case involves both a challenge to pre-hearing deportation procedures and a long-term lawful permanent resident, the government's plenary power argument is in fact significantly *less* persuasive than it was in *Zadvydas*.[6]

In sum, the government has its basic constitutional principles exactly wrong. There has been no question for more than a century, and there is surely no question today, that all non-citizens within the United States are 'persons' fully protected by the Fifth Amendment. This principle is especially clear as to legally-admitted permanent residents such as Mr. Kim. When the United States screened and admitted Mr. Kim as a young child, it relinquished whatever residual authority[7] it might have had to treat him as someone

---

[5] *See also Johnson v. Eisentrager*, 339 U.S. 763, 770–71 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) ("Once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.")

[6] As the Court of Appeals recognized, this case involves an individual who retains his lawful permanent resident status and his right to live and work in this country. In contrast, *Zadvydas* involved a challenge by *former* lawful permanent residents who had already been ordered removed and had thereby lost any right to remain. *See Zadvydas*, *supra* at 720 (Kennedy, J., dissenting) ("[I]t must be made clear these aliens are in a position far different from aliens with a lawful right to remain here."). Thus, the government's argument as to plenary power in this case is backward. If anything, the concerns of which gave rise to the plenary power doctrine are implicated *more* by the persons at issue in *Zadvydas*—those found to be subject to removal—than to those merely accused. In addition, the detention scheme in *Zadvydas* provided a procedure, albeit an informal one, through which persons who had been ordered removed could demonstrate lack of danger and flight risk and perhaps qualify for release. In contrast, the statute at issue here provides no such possibility.

[7] *Amici* do not concede that any person is completely outside the protections of the constitution when the U.S. government seeks to act to detain or prevent entry into U.S. territory. This question, however, is well beyond the scope of what is presented by this case.

outside of the protections of our Constitution. There is no basis in logic, justice or precedent for the proposition that the 'plenary power' of the government overrides due process protections for lawful permanent residents. Nor does it mandate deferential review of detention laws.

ARGUMENT

I. ALL NON-CITIZENS WITHIN THE UNITED STATES ARE PROTECTED BY THE CONSTITUTION WHEN THE GOVERNMENT ACTS TO DETAIN OR TO REMOVE THEM

A. The Plenary Power Doctrine Was First Developed in a Largely Discredited Case Involving the Exclusion of Non-citizens

The 'plenary power doctrine' originated in *The Chinese Exclusion Case* (*Chae Chan Ping v. United States)*, 130 U.S. 581 (1889). That case involved a Chinese laborer who, in 1887, had obtained a certificate permitting him to re-enter the United States. The Court held that he had no right to challenge his subsequent exclusion from the country as a result of an 1888 statute that voided previously obtained certificates. As articulated by Justice Field, writing for the majority, Congress' ability to pass legislation to exclude non-citizens, "is a proposition which we do not think open to controversy." *Id.* at 603. More broadly, the Court concluded that the federal power to exclude non-citizens was an inherent attribute of sovereignty, extra-constitutional, essentially unchallengeable by anyone, and unreviewable by the judicial branch. *Id.* at 604, 609.

The Court reasoned similarly in another case from the same era: *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), again affirming the federal government's plenary power to exclude without judicial intervention. The Court found that it was not "within the province of the judiciary" to order the entry of foreigners who are not residents of the United States. For such people, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Id.* at 660. With important limitations described below, the Court has generally adhered to this rule - declining to intervene in cases involving the determination of whether a particular non-citizen will be admitted or excluded from the country, except as authorized by statute or regulations.

The doctrine reduces to the idea that because authority over immigration into the United States flows from sovereignty itself -- particularly the need for the sovereign to control relations with other nations -- certain decisions implementing the immigration power may receive at most highly deferential judicial review.[8]

---

[8] For descriptions of the plenary power doctrine and its limitations, see generally T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis, 16 Geo. Imm. L. J. 365 (2002);* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases,* 113 Harv. L. Rev. 1890 (2000); Margaret Taylor, *Detained Aliens: Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 Hastings Constit.. L.Q. 1087, 1128-39 (1995); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. Rev.. 933, 939-951 (1995); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 Am. J. Int'l L. 862, 864-69 (1989); Gerald Neuman, STRANGERS TO THE CONSTITUTION,(Princeton University Press 1996); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 Harv. L. Rev.853, 854-63 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. REV. 255, 256-78; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev.. 165, 166-80 (1983); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625, 1632-50 (1992); Hiroshi

As its name suggests, *The Chinese Exclusion Case* involved a law with ugly racial undertones. More specifically, however, it concerned the government's *exclusion* of a non-citizen at the border. Although Chae Chan Ping had previously resided in the United States, the Court at this time treated him as a first-time entrant without constitutional status.[9] Justice Field, using rather inflammatory discourse, reasoned that the exclusion of foreigners was an "incident of sovereignty:"

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.

Id. 130 U.S. at 606

For various reasons, since its first enunciation, the plenary power doctrine has proven controversial, generating strong dissents and significant limitations in virtually every case in which the government has sought for it to be applied. *See also Reid v. Covert*, 354 U.S. 1, 5-7 (1957) (stating that the United States is "entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. . .") (footnotes omitted). As many

---

Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 550-60 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 14-18 (1984).

[9] This aspect of the case as to lawful permanent residents has been definitively rejected by *Landon v. Plasencia, supra.*

commentators have noted, the plenary power doctrine has impeded the development of coherent principles of constitutional immigration law. *See e.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545 (1990) (suggesting that the plenary power doctrine has prevented the growth of a coherent constitutional framework for immigration law, within which its sub-constitutional levels: statutes, regulations, agency directives, etc, can develop and be administered fairly and predictably.)

The doctrine became most controversial in the context of deportation. In *Fong Yue Ting v. United States,* 149 U.S. 698, 707 (1893), the Court majority stated that "the right of a nation to expel or deport foreigners…rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance." The case involved the deportation of Chinese persons who could not meet a statutory requirement of a "credible white witness." Within a decade, however, the basic position advocated by the dissenters generally prevailed and has been the law ever since.

The notion of 'plenary power' within U.S. territory, especially as applied to lawful permanent residents, had proved deeply troubling from its earliest assertions. As Justice Brewer asked in dissent in *Fong Yue Ting*:

> Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists.

149 U.S. 698, 737 (1893). [10]

The language of the *Fong Yue Ting* majority - that the power to deport was as "absolute and unqualified" as the power to exclude - was dramatic, if not shocking. Taken literally, it could have meant that non-citizens, legally resident or not, have no constitutional rights at all in deportation proceedings. The Court, however, tested and rejected this extreme proposition three years later in *Wong Wing v. United States*. The 1892 Act at issue in *Fong Yue Ting* also contained a section that provided for the imprisonment at hard labor for up to a year of any Chinese citizen judged to be in the U.S. illegally. The statute provided no right to trial by jury. The Court held this provision unconstitutional, even though detention or temporary confinement was permissible "as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens." *Id.* at 235. When Congress pursues deportation policy by subjecting non-citizens to "infamous punishment at hard labor, or by confiscating their property," however, then "such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused." *Id.* at 237

Although the *Wong Wing* Court generally reaffirmed aspects of the holding of *Fong Yue Ting*, it seems to have viewed the constitutional civil/criminal line as more important than the "plenary power" doctrine that had previously been applied to deportation. The Court in *Wong Wing* sought a consistent 'theory of our government' with

[10] *See also, Mezei, supra*, 345 U.S at 226 (Jackson, J., *dissenting*) ("Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities?"); *Jean v. Nelson*, 472 U.S. 846, 874 (1985) (Marshall J., *dissenting*) ("Only the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement.")

which to distinguish deportation from punishment. 163 U.S. at 238. *See generally*, Kanstroom, *Deportation, Social Control, and Punishment, supra.* It did not seek an overarching extra-constitutional principle based upon the status of alienage to avoid the apparent dilemma presented by the 1892 law:

> But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.

Id. at 237.

The Court in *Wong Wing* thus made it very clear more than a century ago that the implications of *Yick Wo v. Hopkins* were powerful, even in the deportation context. All persons in the United States are entitled to the protections of the Fifth and Sixth Amendments. Generalizations about plenary power and deference cannot override those basic rights.

B. There is a Well-Recognized Distinction Between the "Plenary Power" of Congress as to Substantive Immigration Laws and the Constitutional Limits on that Power to Detain Individuals Within the United States

This Court, as noted above, has long held that non-citizens within our physical borders are persons within the meaning of the Due Process Clause. *See, e.g., Yick Wo,* 118

U.S. at 369; *Wong Wing,* 163 U.S. at 238; *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments"). *See also Almeida-Sanchez v. United States*, 413 U.S. 266, 272-74 (1973) (Fourth Amendment protects as to searches and seizures within the United States). This is no less true when persons are placed in removal proceedings. Concurring in *Wong Wing,* Justice Field, the original author of the 'plenary power doctrine,' put the matter as follows:

> The term 'person,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic . . . This has been decided so often that the point does not require argument.

163 U.S. at 242 (Field, J., concurring in part and dissenting in part).

The Government has suggested in this case that § 1226(c) is subject to deferential or at most "rational basis" review because it arises in the context of immigration, an area in which Congress has traditionally been afforded "plenary" authority. (Pet. Br. at 32-33). This Court has repeatedly emphasized, however, that there is a profound difference between Congress' authority as to substantive immigration policy choices, such as visa categories, and the means chosen to implement and enforce those choices.[11] This dichotomy in constitutional immigration law, though hardly unproblematic, makes some sense in light of the underlying premises that gave rise to the plenary power doctrine. The distinction preserves the power of the political branches to

[11] As this Court noted in *Galvan v. Press*, "policies" are entitled to judicial deference, but "the government must respect the procedural safeguards of due process." 347 U.S. 522, 742 (1954).

control entry into and lawful status within the United States, as well as substantive naturalization authority. Matters of procedure, conversely, concern questions that are traditionally recognized as within judicial competence and expertise. This is particularly true as to procedural matters that arise pending the final resolution of a removal proceeding.

The constitutional question in this case in no way implicates substantive immigration policy choices. The grant of a bond hearing or even release from detention does not grant to the non-citizen the lawful status that under the plenary power doctrine is held to be under the control of the political branches. The constitutionality of mandatory detention without any time limit and without any individualized determination of danger or flight risk is a question that is well within the authority of the judicial branch. As Justice Jackson noted in *Mezei, supra*, "Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is outside our gates." Jackson, J. *dissent* 345 U.S. at 218.

Moreover, although detention is a procedural aspect of the deportation process, it raises basic constitutional issues whenever and against whomever it is used.[12] *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. . . .[therefore] we have sustained civil commitment statutes when they have coupled proof of

[12] *See e.g., United States v. Hare*, 873 F.2d 796, 801 (5th Cir. 1989)(holding, post-*Salerno*, that "in determining whether due process has been violated, a court must consider not only factors relevant in the initial detention decision[ ] . . . but also additional factors such as the length of the detention that has in fact occurred or may occur in the future"); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986) ("Although pretrial detention is permissible when it serves a regulatory rather than a punitive purpose, we believe that valid pretrial detention assumes a punitive character when it is prolonged significantly.")

dangerousness with the proof of some additional factor, such as a mental illness or mental abnormality.") (citations and quotations omitted); *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) ("Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed"); *United States v. Salerno*, 481 U.S. 739, 747 (1987)("general rule" of substantive due process is that the government may not detain a person prior to a judgment of guilt in a criminal trial); *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (an individual held as unfit to stand trial cannot be committed for more than a reasonable period necessary to determine whether he will become competent in the foreseeable future). As this Court recently noted, it has "upheld preventive detention based on dangerousness only when . . . subject to strong procedural protections," including, "proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards" *See Zadvydas*, 533 U.S. at 678 (citing *Salerno*).

Though it is a means to the end determined by substantive immigration policy, the means itself is subject to close constitutional scrutiny. *See Wong Wing,* (stating that detention or temporary confinement by immigration authorities constitutes, "part of the means necessary to give effect to" substantive decisions about exclusion or deportation). Indeed, *Wong Wing* involved a statute that authorized executive imprisonment of certain non-citizens for one year after the entry of a final order of deportation. *Id.* This Court, while acknowledging the government's broad power over immigration and the permissibility of "temporary confinement . . . while arrangements [are] being made for their deportation" nevertheless struck down the statute. *Id.* Quoting *Yick Wo's* holding that the Fourteenth Amendment is "universal in [its] application to all persons within the

territorial jurisdiction, without regard to . . . nationality," the Court continued:

> All persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments, and . . . even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.

Id. at 238; *Yick Wo,* 118 U.S. at 369.

As the Due Process Clause protected Wong Wing against arbitrary detention, it surely protects those who, like Mr. Kim, were lawfully admitted to the United States, during proceedings to determine whether they are even subject to removal.

Among the many reasons to support such a protective rule is a basic concern with the dangerous precedent that would be set by the allowance of government power to incarcerate anyone without a bail hearing, based solely on an accusation. As Thomas Jefferson --writing particularly to oppose the Federalists' Alien Friends Act, Alien Enemies Act, and Sedition Act [13] --warned, in 1798: "The friendless alien has indeed been selected as the safest subject of a first experiment, but the citizen will soon follow. . . ." [14]

---

[13] Alien Friends Act, ch. 58, 1 Stat. 570, 571 (1798) (expired June 25, 1800) (permitting the President to order any alien whom he judges "dangerous to the peace and safety of the United States" to leave the country without a hearing); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. §§ 21–23 (1999)) (permitting the President during war to apprehend, restrain, secure, and remove all enemy aliens without a hearing); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801).

[14] *See The Kentucky Resolution*, Documents of American History 181 (Henry Steele Commager ed., 6th ed. 1958).

Moreover, the *Wong Wing* principle of constitutional limitations on government power was and is completely consonant with the evolving jurisprudence of this Court as to the rights of non-citizens in deportation proceedings. As the Court stated seven years later, in *Yamataya v. Fisher*, "this court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law.'" 189 U.S. at 100. In *Yamataya*, a non-citizen was arrested after entering the United States on the ground that she was a pauper and therefore ineligible to become a permanent resident. The government insisted, with arguments not dissimilar to those presented in this case, that its plenary power over immigration overrode the protections of the Fifth Amendment. The Court, however, rejected that argument, holding that the statute being reviewed must be interpreted to "bring [it] into harmony with the Constitution" and its due process guarantees. *Id.* at 101.

Since *Yamataya*, the Court has reiterated repeatedly that non-citizens are entitled to due process during deportation proceedings. *See e.g., Mezei,* 345 U.S. at 212 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *Johnson v. Eisentrager*, 339 U.S. 763, 770–71 (1950) (recognizing that aliens are protected "against Executive deportation except upon full and fair hearing"); *Bridges v. Wixon*, 326 U.S. 135, 150–57 (1945); *see also Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) ("[B]oth removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious"). Plenary power, in sum, has nothing to do with the due process calculus required in this case.

Nor should this Court apply a 'categorical' model that would dramatically differentiate the due process rights of citizens from those of non-citizens. The Constitution, though it makes some categorical distinctions between citizens and non-citizens, surely does not leave the latter rightless. Most of the textual distinctions involve political rights such as election to federal office and voting. [15] The Bill of Rights, however, uses non-categorical, broader terms such as "person" and "the accused" that have long been construed to protect non-citizens. *See e.g., Wong Wing v United States, supra, Yick Wo, supra.* Thus, although certain constitutional entitlements may be subject to categorical limitations, "categorical distinctions, founded on legal status, cannot overwhelm the proud tradition of *Yick Wo* and *Wong Wing*." *See Martin, supra.*

It was for this reason that the Court in *Carlson v. Landon,* 342 U.S. 524 (1952) upheld the Attorney General's discretionary authority to detain some deportable non-citizens deemed to be Communists, while expressly noting that "[o]f course purpose to injure could not be imputed generally to all aliens subject to deportation..." Detention at that time was based on a system, unlike § 236(c), that *included* an individualized determination that release of the particular non-citizen posed a danger to the public. *See id.* at 538, 541-42. Even though deportation in 1952 could be premised on party membership alone—a regime that would likely be found unconstitutional today--the order to detain a person pending deportation proceedings required significantly more than that. *Id. at* 541. Detention was permissible based on "evidence of membership *plus* personal activity in supporting and extending the Party's philosophy concerning violence.") *Id.* (*emphasis added*).

[15] See e.g., Art I, § 2, cl 2 (members of the House of Representatives must have been U.S. citizens for seven years); Art I, § 3, cl 3 (Senators must have been U.S. citizens for nine years); Art II, § 1, cl 5 (President must be a natural born citizen).

Reno v. Flores does not establish a contrary constitutional rule. (*See* Pet. Br. at 33). First, as a threshold matter, the *Flores* Court described the issue in that case as one of "custody" over non-citizen juveniles, rather than incarceration or detention. *See Flores* (emphasizing that the juveniles were held in licensed juvenile care facilities, not in "shackles, chains or barred cells," and that, for this reason alone, "freedom from physical restraint" was "not at issue" in the case.) 507 U.S. 292 (1993). Moreover, as in *Carlson*, the regulation in question specifically "maintain[ed] the discretion of local INS district directors to release detained minors to other custodians in unusual and compelling circumstances." *Id.* at 310 (citing 57 Fed. Reg. 17449 (1988); *see also id.* at 313-14 (noting that among the determinations INS made in each individual case was whether "the alien's case [was] so exceptional as to require consideration of release to someone else"). Most importantly, the agency discretionary determination was itself subject to review by an immigration judge, the BIA and, ultimately, the federal courts. *Id.* at 308. As this Court stated, "due process is satisfied by giving the detained alien juveniles the right to a hearing before an immigration judge." *Id.* at 309

II. THIS COURT HAS APPLIED THE PLENARY POWER DOCTRINE TO THE DETENTION OF LAWFULLY ADMITTED PERMANENT RESIDENTS DURING REMOVAL PROCEEDINGS TO A MUCH LESSER EXTENT THAN TO NON-CITIZENS SEEKING ADMISSION

Even in matters relating to their removal, non-citizens lawfully admitted to our country have long been treated differently than those at the border seeking first-time admission. This distinction runs deep in our constitutional

history. As Edward Livingston put it, more than two centuries ago:

> [A]lien friends...residing among us, are entitled to the protection of our laws, and...during their residence they owe a temporary allegiance to our government. If they are accused of violating this allegiance, the same laws which interpose in the case of a citizen must determine the truth of the accusation, and if found guilty they are liable to the same punishment.

8 Annals of Cong. 2012. (1798).

Since *Yamataya*, for nearly a full century, this Court has consistently differentiated the rights of non-citizens who have been admitted as permanent residents from those who have not. This differentiation reflects, among other things, the legality of the person's admission, the formality with which the nation recognizes status, mutuality of obligation, allegiance, and, often, the length of time of residence and the likelihood of family and other social ties. *Id.* ("aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"); *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) ("our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . .. and those who are within the United States after an entry, irrespective of its legality"); *Plasencia*, 459 U.S. at 32 (adopting and applying *Mathews* standard for evaluating whether deportation procedures satisfy due process for returning lawful permanent residents.)

Plasencia demonstrates that this distinction is generally based both on the location of the non-citizen and the special protection afforded to lawful permanent residents. 459 U.S. at 30-32. *Plasencia*, a resident alien who had

briefly left the United States for Mexico, was caught smuggling aliens upon her return. *Id.* at 23. The government argued that she should be treated as an "excludable alien," with no due process rights. But in an opinion for eight members of the Court (and with Justice Marshall concurring), Justice O'Connor disagreed and held that Plasencia was protected by the Due Process Clause. *Id.* at 32. "Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Id.*; *see also Reno v. Flores*, 507 U.S. 292, 306-07 (1993) (holding that detention of aliens during the deportation process must be measured by the Due Process Clause).

This approach involves recognition by this Court of long-standing aspects of the U.S. immigration system. Since the 1920s, U.S. law has been characterized by administrative practices that distinguish admission for permanent residence from that for a temporary stay. Lawful permanent residents--green card holders--have wide access to employment and are generally as protected as citizens in their rights to enter into contracts and to acquire property. They are the only group of non-citizens directly eligible to apply for citizenship. Lawful permanent residents are also subject to some obligations quite comparable to those imposed on citizens. In general, they are taxed as are citizens, based on their worldwide income.[16] They are subject to conscription.[17] These legal protections reflect deep emotional and psychological realities. As one commentator has noted of lawful permanent residents: "In general, they come to stay, they shift their expectations about where home is, and they sink roots they

---

[16] *See* David M. Hudson, *Tax Problems for Departing Aliens*, 97-03 Immigration Briefings 1-3 (March 1997).

[17] See, e.g., Selective Service Act of 1948, c 625, Title I, § 3, 62 Stat 604, 605. Although no conscription currently takes place, resident aliens must register for the draft, while non-immigrants are expressly exempt from registration. 50 USC App § 453 (2000). Unlike citizens, LPRs have been permitted to opt out of subjection to conscription, but only at the cost of becoming ineligible for naturalization. *See* INA §§ 101(a)(19), 315, 8 USC §§ 1101(a)(19),1426 (2000).

rely on to be durable." Martin, 2001 Sup. Ct. Rev. at 104. This understanding "does not rest only on idiosyncratic expectations or exaggerated hopes adopted by the [lawful permanent residents] themselves." Instead it is anchored in a whole host of social and cultural expectations on the part of those around them about what it means to be a U.S. lawful permanent resident, "manifested in seventy-five years of consistent governmental practices." *Id.* Notwithstanding the government's apparent invitation to do so, this Court should not over-ride these considerations by disparaging the well-recognized rights of lawful permanent residents.

III. THE PLENARY POWER DOCTRINE DERIVES FROM THE COURT'S RECOGNITION OF THE EXECUTIVE'S AUTHORITY OVER FOREIGN AFFAIRS, A CONSIDERATION WITH VIRTUALLY NO RELEVANCE TO THIS CASE

The government claims 'plenary' power to incarcerate Mr. Kim without even granting him a hearing to determine whether he is a flight risk or a danger to the community. To do so, it implicitly invokes the political branches control over foreign affairs, from which the plenary power doctrine is largely derived. This foreign affairs interest, however, has virtually no conceivable relevance to Mr. Kim, whom the government has already screened and admitted to our country as a young child. As this Court has previously noted, "Not every case that 'touches foreign relations lie beyond judicial cognizance.'" *Baker v. Carr*, 369 U.S. 186, 211 (1962).

A recurring *leitmotif* in the Court's plenary power decisions is the relationship between the political branches' control over immigration and their ability to conduct foreign affairs. *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-

25 (1999); *Fiallo v. Bell*, 430 U.S. 787, 796 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 765-67 (1972); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *The Chinese Exclusion Case,* 130 U.S. at 604-07. The foreign policy concerns that animated cases involving the detention of excludable or inadmissible non-citizens are absent here. Indeed, the underlying reasons for the development of the plenary power doctrine seem less applicable here—where a person has merely been accused of an immigration law violation—than they were in *Zadvydas, supra*, which involved persons who had previously been found subject to removal.

Mr. Kim was screened by immigration officials, admitted lawfully for residence, has remained in the United States and has developed substantial ties with and in our society. Unfortunately, he now faces removal proceedings due to his conviction of certain crimes. But according Mr. Kim basic constitutional rights surely does not "leave an unprotected spot in the Nation's armor." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602 (1953). This is certainly not a case where foreign nations threaten our sovereignty by forcing large numbers of would-be immigrants upon us.[18] Nor is this a case like *Aguirre-Aguirre* where the question was whether the non-citizen's conduct in his home country was politically motivated. 526 U.S. at 423-32. Here, the only grounds for deportation and detention relate to Respondent's past conduct wholly within the United States. Unlike *Aguirre-Aguirre*, the legal issue in this case does not

[18] Decisions upholding the detention of excludable non-citizens often rest upon the claim--wholly inapplicable here--that detention is necessary to protect our nation from the influx of large numbers of unwanted immigrants. *See, e.g., Jean v. Nelson*, 727 F.2d 957, 975 (11th Cir. 1984) aff'd, 472 U.S. 846 (1985) (asserting that release of excludable aliens "would ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back"); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1448 (9th Cir.; en banc), cert. denied, 516 U.S. 976 (1995) (quoting Jean); *Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1447 (5th Cir. 1993) (same).

involve foreign affairs at all. Indeed, the government does not seriously advance any meaningful foreign policy consideration justifying unlimited detention of Mr. Kim.

Amici submit that this Court marked the proper bounds of plenary power in *INS v. Chadha*, when it properly refused to apply that doctrine where no significant connection to foreign affairs had been demonstrated. 462 U.S. 919. While noting the existence of the plenary power doctrine, the Court struck down a statute permitting a legislative veto of the Attorney General's decision to withhold individuals' deportations because Congress had chosen a constitutionally impermissible means to implement its power. *See id.* at 940-41, and *Legomsky*, *supra*, at 299-303 (discussing *Chadha*).

CONCLUSION

Careful judicial review of statutes that provide for mandatory detention of lawful permanent residents without time limit or meaningful individualized hearing do not intrude upon the legitimate authority of the political branches. Indeed, the decision of the Court of Appeals upholds the basic principle--first expressed in *Wong Wing, supra*, and never doubted since--that so long as he remains within the territory of the United States, even a deportable non-citizen remains entitled to the protections of the Fifth Amendment. The judgment below should be affirmed.

Respectfully submitted,

Daniel Kanstroom,
Counsel of Record
Boston College Law School
885 Centre Street
Newton, MA 02459
(617)552-0880

LIST OF *AMICI*

Susan Akram, Boston University School of Law
Filippa Anzalone, Boston College Law School
Arthur Berney, Boston College Law School
Eric D. Blumenson, Suffolk Law School
Richard A. Boswell, University of California Hastings College of Law
Mark Brodin, Boston College Law School
Gabriel J. Chin, University of Cincinnati College of Law
Michael J. Churgin, University of Texas School of Law
Valerie C. Epps, Suffolk Law School
Ed Fallone, Marquette University Law School
Anthony Farley, Boston College Law School
Taylor Flynn, Western New England College School of Law
Niels W. Frenzen, University of Southern California Law School
Phillis Goldfarb, Boston College Law School
H. Kent Greenfield, Boston College Law School
Dean Hashimoto, Boston College Law School
Michael G. Heyman, John Marshall School of Law
Kevin Johnson, University of California, Davis, School of Law
Karl Klare, Northeastern University School of Law
Michael M. Levy, College of William & Mary
Stephen H. Legomsky, Washington University
Peter Margulies, Roger Williams School of Law
M. Isabel Medina, Loyola University, New Orleans, School of Law
Jennifer Moore, University of New Mexico School of Law
Hiroshi Motomura, University of Colorado
Lori Nessel, Seton Hall University of Law
Nancy K. Ota, Albany Law School
Margaret Taylor, Wake Forest University School of Law
Natsu Taylor Saito, Georgia State University College of Law
Alexander Tallchief Skibine, University of Utah College of Law
Aviam Soifer, Boston College Law School

Peter J. Spiro, Hofstra University School Law School
Michael Wishnie, New York University Law School
Arthur D. Wolf, Western New England College of Law

Supreme Court, U.S.
FILED
OCT 28 2002
CLERK

No. 01-1491

IN THE

Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

HYUNG JOON KIM,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, DORIS MEISSNER, AND PAUL W. VIRTUE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

ANTHONY J. ORLER*
HOGAN & HARTSON L.L.P.
500 South Grand Avenue
Suite 1900
Los Angeles, California 90071
(213) 337-6700

* Counsel of Record

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

A. THE DETENTION AND REMOVAL PROCESS 4

B. POLICY HISTORY 14

C. MANDATORY CUSTODY OF LAWFUL PERMANENT RESIDENT ALIENS HINDERS EFFICIENT LAW ENFORCEMENT 18

1. Cases that Raise Serious Issues Going to the Merits of Deportability or Relief from Removal 19

2. Improbable Removals 21

3. Not Dangerous and Unlikely to Abscond 21

4. Alternative Mechanisms are Available to Assure Criminal Removals 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES:

Bazan-Reyes v. INS, 256 F.3d 600, 603-04, 612 (7th Cir. 2001) 20

Gerbier v. Holmes, 280 F.3d 297 (3d Cir 2002) 8

In re A-P-, 22 I.&N. Dec. 468 (BIA 1999) 12

In re Bahta, 22 I.&N. Dec. 1381(BIA 2000) 8

In re Eloy Arguelles-Campos, 22 I.&N. Dec. 811 (BIA 1999) 11

In re Joseph, 22 I.&N. Dec. 799 (BIA 1999) 8

In re Lok, 18 I.&N. Dec. 101 (BIA 1981) 13

In re Newchurch, 807 F.2d 404 (5th Cir. 1986) 7

Kim v. Ziglar, 276 F.3d 523 (9th Cir. 2002) 4

Sui v. INS, 250 F.3d 105 (2d Cir. 2001) 8

United States v. Christopher, 239 F.3d 1191 (2001) 8

United States v. Graham, 169 F.3d 787 (3d Cir 1999) 8

United States v. Pacheco, 225 F.3d 148 (2d Cir. 2000) 8

United States v. Salerno, 481 U.S. 739 (1987) 7

Zavydas v. Davis, 533 U.S. 678 (2001) 3, 21

STATUTES:

8 U.S.C. § 1101(a)(43)(F) 20

8 U.S.C. § 1158 11

8 U.S.C. § 1182(a) 11

8 U.S.C. § 1226 5

8 U.S.C. § 1226(c)(1) 8

8 U.S.C. § 1226(c)(2) 9

TABLE OF AUTHORITIES --Continued.

Page

STATUTES:

8 U.S.C. § 1226(a) 5

8 U.S.C. § 1226(c) 5, 7

8 U.S.C. § 1226(d) 5

8 U.S.C. § 1227(a)(1)(B) 2, 11

8 U.S.C. § 1227(a)(1)(C) 12

8 U.S.C. § 1227(a)(2) 12

8 U.S.C. § 1229 10

8 U.S.C. § 1229a 5, 11

8 U.S.C. § 1229b 11

8 U.S.C. § 1229(c) 13

8 U.S.C. § 1231(b)(3) 11

8 U.S.C. § 1252 (a)(2) 5

18 U.S.C. § 3142 et seq. 7

18 U.S.C. § 3142(f) and (i) 7

18 U.S.C. § 16(b) 19

Pub. L. No. 104-208, div. C, 110 Stat. 3009-536 5

RULES AND REGULATIONS:

8 C.F.R. pt. 240 11

8 C.F.R. § 1.1(p) 13

8 C.F.R. § 3.19 ..... 6, 9

8 C.F.R. § 3.19(b) 6

8 C.F.R. § 3.19(d) 6

8 C.F.R. § 3.19(i) 6

8 C.F.R. § 3.19(h) 6

8 C.F.R. § 208.16 11

TABLE OF AUTHORITIES -- Continued

Page

RULES AND REGULATIONS:

8 C.F.R. § 208.17 11

8 C.F.R. § 236(c)(1) 9

8 C.F.R. § 236.1 (2002) 9

8 C.F.R. § 236.1(c)(10) 8

8 C.F.R. § 236.1(d)(1) 6, 8

8 C.F.R. § 236.1(d)(3) 6, 9

8 C.F.R. § 239.1 10

8 C.F.R. § 240.1 11

8 C.F.R. § 240.3 11

8 C.F.R. § 240.53 11

67 Fed. Reg. 31157, 31161-31164 (proposed May 9, 2002) (to be codified at 8 C.F.R. pts. 3, 236, 240, and 241) 22

67 Fed. Reg. 31161 (to be codified at 8 C.F.R. § 3.2, 3.23) 22

67 Fed. Reg. 31163 (to be codified at 8 C.F.R. § 241.18) 22

S. Ct. Rule 37.6 2

LEGISLATIVE MATERIALS:

139 Cong. Rec. E705-01 (1993) 16

138 Cong. Rec. H9759-02 (1992) 16

H.R. REP. 104-469, pt. 1 (1996) 16

S. REP. 104-48 (1995) 16

TABLE OF AUTHORITIES -- Continued

Page

OTHER AUTHORITY:

Andrew I. Schoenholtz and & Thomas F. Muther, Jr., *Immigration and Nationality*, 33 INT'L LAW. 517 (1999) 14

Asylum and Migration Issues: The Case of South Texas February 1989, 101st Cong., 1st Sess. (S. Rep.101- F. Supp.+49) (March1989) 9

Christopher Stone, Supervised Release as an Alternative to Detention in Removal Proceedings: Some Promising Results of a Demonstration Project, 14 Geo. Immigr. L.J. 673 (2000) 23

Controlling Criminal and Illegal Aliens, Statement of Cmsr. Doris Meissner for a Hearing on Criminal Aliens and Bord[illegible] Before the House Judiciary Co[illegible] on Immigration and Claims (Feb. 25, 1999) 18

INS Detention Operations Manual available at http://www.ins.u[illegible].gov/graphics/lawsregs/guidance.htm 10

Peter H. Schuck, IN[illegible] Detention and Removal: A "White Paper", 11 G[illegible] Immigr. L.J. 667 (1997) 15

Statements of Cmsr. Doris Meissner Before the Senate Comm. On Approps. Subcomm. On Commerce, Justice, State, and the Judiciary (March 3, 1998) 17

Testimony on INS, Hearing Before the Sucomm. On Immigration and Claims of the Comm. On the Judiciary (May 13 1997) 9

1997 Statistical Yearbook of the Immigration and Naturalization Service 17

1998 Statistical Yearbook of the Immigration and Naturalization Service 18

1999 Statistical Yearbook of the Immigration and Naturalization Service 1

IN THE

Supreme Court of the United States

OCTOBER TERM, [TERM YEAR]

No. 01-1491

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

HYUNG JOON KIM,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, DORIS MEISSNER, AND PAUL W. VIRTUE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST

This brief *amici curiae* is filed in support of Respondents by four former high-ranking officials in the Immigration and Naturalization Service ("INS" or the "Service") who were responsible for managing enforcement actions both before and after the implementation of the mandatory detention challenged

in this action.[1] T. Alexander Aleinikoff served as General Counsel from March 1994 to July 1995 and as Executive Associate Commissioner for Programs from July 1995 to January 1997 and is currently Professor of Law at Georgetown University Law Center. David A. Martin served as General Counsel from August 1995 to January 1998, and is currently Doherty Professor of Law and Weber Research Professor of Civil Liberties and Human Rights at the University of Virginia. Doris Meissner served as Acting Commissioner in 1981, as Executive Associate Commissioner from 1982 to 1986, and as Commissioner from October 1993 to November 2000, and is currently Senior Fellow at the Migration Policy Institute. Paul W. Virtue served as Deputy General Counsel from November 1988 to January 1997, as Acting Executive Associate Commissioner for Programs from January 1997 to February 1998, and as General Counsel from March 1998 to May 1999, and is currently a Partner with the Washington, D.C. office of Hogan & Hartson, L.L.P. Because the amici have extensive experience in the administration of the detention provisions of the Immigration and Nationality Act, and worked diligently throughout their government service to improve INS practices regarding the removal of aliens with criminal records from the United States, their views have been formulated through a practical understanding and application of immigration policy and procedure. During amicus Meissner's tenure as Commissioner, and before the institution of a mandatory detention rule, removals of criminal aliens increased from 27,827 in FY 1993 to 55,489 in FY 1998.[2]

---

1 No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae or their counsel, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. The brief is filed with the consent of the parties and copies of the consent letters have been filed with the Clerk of the Court.

2 1998 Statistical Yearbook of the Immigration and Naturalization Service.

Drawing upon their experience, amici submit this brief in order to provide a more complete context for judging the assertions in the brief for the petitioners and to offer the Court their views about the effects of mandatory custody on the fair and efficient enforcement of the immigration laws.

SUMMARY OF ARGUMENT

Detention is clearly an important element in an effective immigration enforcement system. The ruling of the Ninth Circuit does not prevent its use. Instead it simply requires an individualized determination of flight risk and dangerousness before subjecting lawful permanent residents, who are not yet the subjects of final removal orders, to sustained detention.

The government argues that the court must consider the relatively brief duration of detention in assessing the constitutionality of mandatory custody. *Brief for the Petitioners at 14.* The statistics cited by the government, however, draw no distinction between lawful permanent residents and other detained aliens. Id. At 49. Moreover, the median period of detention is misleading skewed as it is by the large number of detained aliens who concede deportability, do not apply for relief from removal and are promptly removed. When viewed in the context of an individual case the mandatory detention period can last much longer, particularly for permanent resident aliens, who because of their lawful status are more inclined than out-of-status aliens to challenge deportability and to be eligible for relief from removal.

An absolute detention requirement affecting such a broad class of aliens is both unfair and inefficient because it fails to account for the following general situations: permanent resident aliens whose circumstances present serious legal and factual issues that may take months or longer to resolve, aliens whose

ultimate removal is improbable (as in *Zavydas v. Davis*, 533 U.S. 678 (2001)), and aliens who are unlikely to abscond because of individual circumstances and who have manifested no danger to the community. Moreover, the legitimate interest in assuring the removal of criminal aliens ruled deportable can be fully served without a rigid rule requiring mandatory detention. The Court of Appeals for the Ninth Circuit held that a lawful permanent resident alien in removal proceedings must be afforded "a bail hearing with reasonable promptness to determine whether the alien is a flight risk or a danger to the community." *Kim v. Ziglar*, 276 F.3d 523, 539 (9th Cir. 2002).

Finally, the INS has ample tools available without mandatory detention to assure reaching a goal amici share with the government: reliable performance in securing actual removal, at end of proceedings, of persons ruled deportable and not given relief. In fact, steadily increasing resources and improved INS practices, such as the institutional hearing program (IHP), gradually brought about improvements in the criminal alien removal rate even before the mandatory custody provisions took effect. Combined with new measures, including penalties for failure to surrender for removal, automatic stays of custody redeterminations pending appeal, and a promising study of alternatives to detention, discretionary detention provides a fair and efficient mechanism for assuring removal in appropriate cases.

ARGUMENT

A. THE DETENTION AND REMOVAL PROCESS

A sound understanding of the nature of the detention and removal process is a useful place to start in assessing the present controversy. With such an understanding one can gain a better perspective on the

situation Congress faced in the early 1990s, leading up to enactment of mandatory custody, and of alternative ways to achieve the goal of removing criminal aliens, without the severe impairment of individual liberty interests entailed by mandatory detention.

The process under which aliens are detained prior to an order of removal is governed by the terms of section 236 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1226, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-536. Under the current provisions, aliens charged with being inadmissible or deportable are subject to uniform proceedings to determine their removability *vel non*. 8 U.S.C. § 1229a. While these removal proceedings are pending, INA § 236 gives the Attorney General discretion to arrest, detain and release aliens who may be subject to removal, 8 U.S.C. § 1226 (a), but mandates that the Attorney General detain without bail certain aliens who have committed crimes. 8 U.S.C. § 1226 (c). The statute further directs the Attorney General to develop a coordinated system to identify and transfer such aliens from the custody of federal, state, and local law enforcement agencies to INS custody. 8 U.S.C. § 1226 (d).

Traditionally, the INA has authorized the Attorney General, in his discretion, to detain suspected deportable aliens found in the United States in order to ensure availability for proceedings and removal and to limit the risk of danger to the community. *See* 8 U.S.C. § 1252 (1994). In enacting section 236, Congress preserved the Attorney General's discretionary detention authority for noncriminal aliens found in the United States. Aliens who are in removal proceedings, but who do not fall under the mandatory detention framework of INA § 236(c) are subject to a less arbitrary, though no less effective, detention procedure. Under 8 U.S.C. § 1226(a), the Attorney General has the authority to arrest,

detain and release aliens who are subject to removal proceedings. The initial decision of whether to detain, to release, or to release on bond or other appropriate conditions is made on a case-by-case basis by the District Director and is ordinarily completed within twenty-four hours of the arrest. 8 C.F.R. § 236.1(d)(1). An alien (other than an arriving alien) may appeal the District Director's determination to an Immigration Judge, *id.*, who considers the matter in a streamlined "bond redetermination" procedure that may be conducted orally or by telephone. 8 C.F.R. § 3.19(b). The immigration judge may consider any information presented by the INS or the alien, or independently available to the Immigration Judge. 8 C.F.R. § 3.19(d). The judge may approve the release conditions, modify them, or order release on recognizance. 8 C.F.R. § 236.1(d)(1). The decision of the Immigration Judge, in turn, may be appealed to the Board of Immigration Appeals ("BIA") by either party, and such appeals are likewise generally handled in expedited and less formal fashion than merits appeals. 8 C.F.R. § 236.1(d)(3).

This procedure allows for an individualized assessment of the danger and flight risk posed by a noncitizen. As a result, it permits optimal use of detention space, reserving it for persons who otherwise might abscond or commit further crimes upon release, and also recognizes the significant liberty interest possessed by a person whose removability has not been finally determined. There are strict safeguards in place today, moreover, that prevent the arbitrary release of aliens from INS detention. On any INS appeal, the BIA has authority to stay the decision of the Immigration Judge, and in cases where the district director has denied release or set bond of $10,000 or more, any order of the immigration judge authorizing release is automatically stayed pending an appeal by the INS to the BIA. 8 C.F.R. § 3.19(i). Furthermore, if the Board authorizes release (on bond or otherwise) in such cases, that order is automatically stayed for five days during which the

INS Commissioner may certify the Board's decision to the Attorney General for review under 8 C.F.R. § 3.1(h). If the Commissioner does so, the decision remains stayed pending the decision of the Attorney General. *Id.*

This approach is consistent with bail proceedings in the criminal context. In criminal law,[3] federal courts detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversarial hearing that no release conditions "will reasonably assure...the safety of any other person and the community." *United States v. Salerno*, 481 U.S. 739, 741 (1987). Such a determination is performed to balance the due process rights of the accused against the safety of the community. *Id.* at 742-743. Such a determination is made by a judicial officer, and the outcome of that determination must be in writing and must be supported by clear and convincing evidence to deny bail for arrestees. *Id.*; *see also* 18 U.S.C. §3142(f) and (i).

Similar inquiries are made by a judge with regard to a defendant's risk of flight from prosecution, and other important governmental interests. *In re Newchurch*, 807 F.2d 404, 408-409 (5th Cir. 1986). A person accused of a crime should not be deprived of personal liberty unless confinement is reasonably necessary to assure the defendant's presence at trial, or to protect some other important governmental interest, given the due process requirement that the government restrict freedom of individuals in the least restrictive manner. *Id.* at 408.

Section 236(c) of the INA, 8 U.S.C. § 1226(c), enumerates a broad range of crimes, the commission of which will subject an alien to mandatory detention during removal proceedings. Any alien who is deportable by reason of committing (1) a crime involving moral turpitude within five years of admission

---

[3] *See* 18 U.S.C. § 3142 et seq.

for which a sentence of one year or longer was imposed, (2) two crimes involving moral turpitude during any period, (3) an aggravated felony, (4) any terrorist activity, (5) any controlled substance violation other than a single offense involving possession of 30 grams or less of marijuana, (6) firearms offenses, or (7) a variety of other miscellaneous crimes, shall be detained. 8 U.S.C. § 1226(c)(1).

The broad sweep of these provisions has made aliens subject to removal for a remarkably wide range of fairly minor criminal convictions. For example, the Second Circuit reluctantly held that a misdemeanor could fall within the definition of "aggravated felony," including a misdemeanor for stealing four packs of Newports and two packages of Tylenol Cold medicine. *See United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000). Shoplifting is also considered an "aggravated felony" in the 11th Circuit. *See United States v. Christopher*, 239 F.3d 1191 (2001). Attempted possession of stolen goods was held to be an aggravated felony[4] while possession of counterfeit securities was not.[5] Admitted possession of between five and fifty grams of cocaine (actual possession was more than twice this amount) is not an aggravated felony,[6] but state misdemeanor petit larceny is.[7]

The initial determination as to whether an alien is subject to mandatory detention under this section is made by the INS District Director. 8 C.F.R. § 236.1(d)(1). An alien detained under § 236(c)(1) may appeal this determination (solely on the grounds that the section does not apply to his or her circumstances) to an immigration judge. 8 C.F.R. §§ 3.19(h)(2)(ii);

[4] *See In re Bahta*, 22 I.&N. Dec. 1381(BIA 2000).

[5] *See Sui v. INS*, 250 F.3d 105 (2d Cir. 2001).

[6] *See Gerbier v. Holmes*, 280 F.3d 297 (3d Cir 2002).

[7] *See United States v. Graham*, 169 F.3d 787 (3d Cir 1999).

236.1(c)(10) & (d)(1); *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999). This determination (again on the limited grounds of the applicability of the section) in turn may be appealed to the BIA. 8 C.F.R. § 236.1(d)(3). Once an alien is determined to be covered by § 236(c)(1), he or she may not be released until the conclusion of his or her removal proceedings (unless such release is necessary to protect a government witness under 8 U.S.C. § 1226 (c)(2); 8 C.F.R. § 236.1 (2002)).

The mandatory detention requirements under section 236(c) amount to a wholesale rejection of the criminal law's balanced approach to bonded release determinations. No determination is made with regard to either a risk of flight for certain noncitizens, or risks to the community posed by a noncitizen subject to Section 236(c) of the INA. No clear and convincing evidence is required in support of a decision to deny release and no written record explaining why release has been denied must be generated.

Furthermore, mandatory detention ignores the critical practical concerns underlying bonded release: resource limitations. Detention space available to INS, despite significant expansion and improvement in recent years, is and will remain finite. While it might initially seem counterintuitive that INS would seek to use detention on a higher priority basis for some persons without criminal convictions, the fact is that available detention space is critical for other parts of INS's enforcement mission. For example, adequate detention space is important in planning anti-smuggling enforcement efforts[8] and is critical in responding responding to a sudden influx of undocumented migrants such as that experienced in

[8] Testimony of INS, Hearing Before the Sucomm. On Immigration and Claims of the Comm. On the Judiciary (May 13 1997).

South Texas in the late 1980s.[9] The removal of criminal aliens is always a high priority, but in fact there is great variety in personal circumstances among those covered by section 236, and some are better candidates for release, when detention space is limited than are others who have not been convicted of a crime. An individualized determination regarding flight risk and dangerousness permits INS to use resources more sensibly in service of its complete enforcement mission.

Those detained under section 236(c)(1) are typically held in detention facilities under conditions that are largely indistinguishable from those in actual prisons (indeed, in many cases, detainees are held in prisons, although their confinement under section 236 is considered civil). For example, detainees are subject in some circumstances to strip searches. They are not permitted to engage in any professional or business activities or work release programs. They have limited access to their families, legal counsel and research facilities. In addition, they have extremely limited access to their personal property and are restricted in their access to telephone and mail services.[10] These circumstances can hamper their ability to prepare their cases, and they certainly interfere with any opportunity to wind up the individual's affairs, make arrangements for family, or the like, in anticipation of possible removal.

Removal proceedings to determine the inadmissibility or deportability of an alien are initiated by the filing of a notice to appear which must be served at least ten days prior to the first hearing date in the proceeding. 8 U.S.C. § 1229; 8 C.F.R. § 239.1. An alien charged with being inadmissible or deportable is permitted to be represented by counsel (not provided by the

9 *See Asylum and Migration Issues: The Case of South Texas* February 1989, 101st Cong., 1st Sess. (S. REP.101-19), (March 1989).

10 INS Detention Operations Manual *available at* http://www.ins.usdoj.gov/graphics/lawsregs/guidance.htm.

government) in the proceedings, which are presided over by an Immigration Judge. 8 U.S.C. § 1229a; 8 C.F.R. §§ 240.1, 240.3. While the proceedings are generally not as complex as a typical trial in federal court, removal proceedings can involve the taking and defending of depositions, testimony by witnesses, and the presentation of a wide range of evidence, as well as legal and factual arguments. *See* 8 C.F.R. pt. 240. In the case of aliens, like the respondent here, who are charged with deportability, the INS must prove that they are deportable by clear and convincing evidence. 8 C.F.R. § 240.8 (a). Once an order to remove is issued by an immigration judge, an appeal of that decision may be filed within thirty days to the Board of Immigration Appeals. 8 C.F.R. § 240.53. Failure to appeal within thirty days, waiver, or a dismissal of the appeal by the BIA results in a final order of removal. 8 C.F.R. § 241.1.

In the course of removal proceedings, immigration judges determine any contested issues of inadmissibility or deportability,[11] as well as requests for relief from removal, such as cancellation of removal under 8 U.S.C. § 1229b, asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. §1231(b)(3), or protection under the Convention Against Torture, 8 C.F.R. §§ 208.16, 208.17. The close connection between baseline deportability and relief determinations is reflected in the usual sequence of the immigration proceeding. After an individual is charged, she will first appear before an immigration judge at a preliminary procedure known as master calendar.[12] Ten to thirty respondents are generally scheduled during a morning or afternoon master calendar session of immigration court. At this procedure the immigration judge takes the alien's plea to

11 For convenience, this brief will hereafter refer to issues of either inadmissibility under 8 U.S.C. § 1182(a) or deportability under 8 U.S.C. § 1227(a) as "baseline deportability."

12 *See In re Eloy Arguelles-Campos*, 22 I&N Dec. 811 (BIA 1999).

the charges and also asks her whether she will be seeking any forms of relief. If so, the judge assures that the individual has the necessary application forms, and also seeks to determine, through questioning of the INS trial attorney and the alien or her attorney, how much time will be necessary for the merits hearing, coveringany contest over either baseline deportability or relief issues. (Sometimes two or more master calendar proceedings are required, either to assure an opportunity for the alien to secure counsel or to permit a better estimate of the time required for the merits hearing.) Consulting its own schedule as well as that of counsel, the court then sets a merits hearing, reserving a period of a few hours up to several days, depending on the issues and the likely number and type of witnesses indicated at master calendar.

In a substantial majority of cases, the alien concedes baseline deportability—largely because most immigration charges are quite straightforward and not readily subject to dispute. For example, an overstay charge[13] can be proved from INS records and reference to the calendar; unlawful presence without admission[14] can be shown through a certification of the absence of an INS record of admission, and deportability based on criminal convictions[15] can be demonstrated through a record of conviction, because underlying guilt or innocence cannot be retried in immigration court. Deportability could be contested, for example, if it is not clearly established whether the particular offense is properly characterized as an aggravated felony or a crime involving moral turpitude. In this particular instance, a factual hearing may not be necessary, but only briefing and argument on the legal point. But the regulations permit even those contesting deportability to

[13] 8 U.S.C. § 1227(a)(1)(C).

[14] 8 U.S.C. § 1182(a)(6)(A), 8 U.S.C. § 1227(a)(1)(B).

[15] 8 U.S.C. § 1227(a)(2).

plead to the factual allegations and require them to seek any applicable relief at the same merits hearing. *See* 8 C.F.R. § 240.10(c), (d); *In re A-P-*, 22 I.&N. Dec. 468 (BIA 1999). In any event, most merits hearings are devoted to issues of relief, not to contests over deportability. The IJ will not issue a removal order until all questions of both deportability and relief are resolved. Thus the following assertion in the government brief is highly misleading: "a removable alien who is detained while the Attorney General's delegates consider his application for discretionary relief is properly treated as removable unless and until a decision to award discretionary relief is made . . .." *Brief for the Petitioners* at 35. Particularly in the case of permanent resident aliens, the statute and case law specifically provide otherwise: the *lawful* resident status continues until an order of removal becomes administratively final. *See* 8 C.F.R. § 1.1(p); *In re Lok*, 18 I.&N. Dec. 101 (BIA 1981).

If there are no forms of relief requested (other than voluntary departure under 8 U.S.C. § 1229c), the case can be concluded at master calendar with the entry of an order. A significant number of detained aliens (particularly those who are not lawful permanent residents) choose to concede deportability and seek no forms of relief in order to end their detention through prompt deportation. This feature of immigration practice accounts for the statistics relied on frequently in the government's brief showing surprisingly short median periods of detention. *Brief for the Petitioners* at 14, 49, 59. Those statistics are greatly skewed by the significant numbers of detained aliens who have no genuine issue to tender and who wish to conclude the proceedings promptly. But such averages are irrelevant for cases like that presented by respondent Kim, a lawful permanent resident. It is precisely in these cases, which may well involve both contested deportability and issues of relief, where the mandatory detention will be longest (for the immigration court proceedings and BIA and

judicial appeals) and the impact direst—precisely because detention can hamper development and presentation of the alien's case.

B. POLICY HISTORY

The issue of how to improve the efficiency and effectiveness of criminal alien removals was among the top enforcement priorities at INS during the years preceding passage of section 236(c).

As acknowledged at various points throughout the Government's brief, the fundamental difficulties confronting the Service with regard to removals during the early 1990s were resource-driven. INS lacked the detention space necessary to hold even those individuals who were believed to be a flight risk or a potential danger to society. Congress responded by appropriating funds for the expansion of detention facilities and from 1995 to 1998, for example, overall bed space for detained aliens increased almost three-fold. *See* Andrew I. Schoenholtz and & Thomas F. Muther, Jr., *Immigration and Nationality*, 33 INT'L LAW. 517, 525 (1999) ("Compared to three years earlier, bed space nearly tripled from 6,600 beds to 16,000 beds in 1998.").

With expanded detention facilities gradually brought to bear throughout the 1990s, the Service increasingly found itself in a position to make detention decisions during removal proceedings based on factors other than available bed space. With the physical space necessary to detain aliens deemed likely to abscond or pose a danger to the community, the Service saw removal efficiency rates improve dramatically. *See id.* at 527 (noting that in 1998, "[t]he INS removed over 56,000 criminal aliens," which "represent[ed] a nine percent increase over fiscal year 1997's total of some 51,000"). Establishing an effective removal regime thus did not require a mandatory detention rule, but rather the resources to complement the Service's goal of ensuring efficient removal.

The legislative history behind sectio 236(c) reveals that it was enacted to a large extent in response to certain logistical problems with which the INS was continually confronted. Two of the primary areas of concern were a lack of detention space and an inability to identify deportable non-citizens upon release from state or federal custody.

First, the INS's lack of detention space was widely known in the time period leading up to section 236(c)'s passage. An influential Senate Report, created under the direction of Senator Roth and issued shortly before the enactment of section 236(c), noted the "chronic lack of detention space" in the immigration system. S. REP. 104-48, at 23 (1995); *see also id.* at 32 (labeling limited detention space a "fundamental problem confronting the INS"); H.R. REP. 104-469, pt. 1, at 123 (1996) ("A *chief* reason why many deportable aliens are not removed from the United States is the inability of the INS to detain such aliens through the course of their deportation proceedings.") (emphasis added). "The lack of adequate detention space puts extreme pressure on the INS to release, rather than detain, criminal aliens." S. REP. 104-48, at 23. The upshot of this situation, the Report concluded, was that logistical resource issues played a substantial and, in the Report's analysis, inappropriate role in the decision whether a non-citizen should be detained pending removal proceedings. *See id.* (noting that a lack of detention space "puts pressure on the INS to release criminal aliens, which greatly increases their chances of evading removal"); *see also* Peter H. Schuck, *INS Detention and Removal: A "White Paper"*, 11 GEO. IMMIGR. L.J. 667, 673 (1997) ("Indeed, it is not too much to say . . . that the availability of detention (bed) space is what drives and shapes INS enforcement at every point . . .").

The Report concluded that the release of certain non-citizens primarily due to space constraints directly contributed to dismal rates of success when removal was

in fact found to be appropriate. The problems included that many non-citizens would not appear at their removal proceedings or would abscond after being ordered removed, or else that substantial resources would be expended in locating them once removal was ordered.[16] Stated simply, the Report found that "[a]dding detention space and better use of existing space would ameliorate many problems associated with early release of criminal aliens." *Id.* at 27.

A House Report issued approximately one year after this Senate Report also highlighted the serious problems associated with the INS' lack of detention space. *See* H.R. REP. 104-469, pt. 1, at 117 (1996) ("Due to lack of detention space and overcrowded immigration court dockets, many [illegal aliens] have been released into the general population."). Like its Senate counterpart, the House Report cited the problematic situation that, "in deciding to release a deportable alien, the INS is making a decision that the alien cannot be detained given its limited resources." *Id.* at 124.

This Report noted, however, that some problems had in fact been alleviated partially as a result of increased detention space. The Report cited the decreasing

16 *See* S. REP. 104-48, at 21 ("The detention option is problematical because it takes up limited INS bed space and because it costs money. Release, on the other hand, is even more of a problem since large number of non-detained criminal aliens never show up for their deportation hearings. INS needs to acquire additional detention space or better utilize existing space."); *see also* 139 Cong. Rec. E705-01, at E705 (1993) (statements of Rep. Moorhead) ("One of the major flaws in our current deportation process is that the INS lacks sufficient detention space . . . ."); 138 Cong. Rec. H9759-02, at H9760 (1992) (statements of Rep. Schumer) (addressing problem of non-citizens without documents arriving in the U.S. by commercial flight and stating that "because the INS lacks sufficient detention space, the would-be immigrant is typically paroled into the community with instructions to report several months later for a hearing before an INS officer. Most simply disappear.").

number of aliens arriving without valid immigration documents at the New York and Los Angeles airports, "where detention capacity has increased and most mala fide aliens can be detained." *Id.* at 123. Increased space allowed the INS to detain more removable non-citizens, providing a more effective deterrent to potential undocumented entrants.

In addition to detention space, continuous improvements to, and increases in staffing of, the Institutional Removal Program ("IRP") contributed to a doubling of the criminal alien removal rate from 1993 to 1996. *See Testimony of Acting Exec. Assoc. Commr. for Programs, Paul W. Virtue, Before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary* (July 15, 1997). Formerly known as the Institutional Hearing Program ("IHP"), the IRP is a cooperative effort among the INS, the EOIR, and federal, state and local correctional agencies to identify noncitizens who have been imprisoned for deportable offenses and to complete the immigration court hearing process prior to their release from corrective custody. *Id.* at 1. Implemented informally and on a small scale in the early 1980s, the IHP was operating in some seventy-six federal, state and county facilities by 1997. *Id.* at 2. IHP funding increases in 1995 and 1996 permitted the establishment of fifteen IHP hearing sites for the federal prison system. *Id.* at 4.

Well before section 236(c) became effective in October 1998[17], these increases in detention space and other improvements had resulted in significantly higher rates of criminal alien removals. In 1997, the INS added 2,700 beds to its detention capacity, bringing the number to 12,050. *See Statements of Cmsr. Doris Meissner Before the Senate Comm. On Approps. Subcomm. On Commerce, Justice, State, and the Judiciary* (March 3, 1998). The increase in the available detention space

17 IIRIRA, Section 303(b).

contributed to a dramatic improvement in removal rates. In 1997, the INS removed 51,141 criminal aliens, which represented an increase of *thirty-seven* percent over 1996. *See* 1997 Statistical Yearbook of the Immigration and Naturalization Service, at167. In 1998, the INS removed 55,489 criminal aliens, "an increase of nearly 12 percent over 1997." 1998 Statistical Yearbook of the Immigration and Naturalization Service, at 6. The INS stated that this increase was 'the result of increased resources available to the program in recent years and the implementation of expedited removal procedures after April 1, 1997." *Id.* at 5-6.

It bears emphasis that these highly significant improvements occurred before the mandatory detention rule of section 236(c) took effect, owing to INS's invocation of the Transition Period Custody Rules, which permitted discretionary release decisions for aliens with criminal convictions through early October 1998. See Pub. L. No. 104-208, div. C., § 303(b)(3), 110 Stat. 3009-536.[18]

C. MANDATORY CUSTODY OF LAWFUL PERMANENT RESIDENT ALIENS HINDERS EFFICIENT LAW ENFORCEMENT.

Amici's collective experience at INS convinced amici that absolute rules hinder fair and efficient enforcement efforts. Mandatory detention for aliens in removal

---

18 Criminal alien removals increased again in 1999 (to 69,409), after implementation of the mandatory custody rule, 1999 Statistical Yearbook of the Immigration and Naturalization Service, at 6, but the overall statistics through the 1990s demonstrate that mandatory custody is far less important to such improvements than detention resources. Ironically, increased detention resources are indispensable if mandatory detention is to be implemented successfully, but once such resources are available, mandatory rules are largely superfluous. Thereafter, INS district directors can make release decisions based squarely on flight risk and dangerousness, without the distorting role that resource limitations played in the early 1990s.

proceedings is a paradigmatic example of this phenomenon. For example, as the number of detainees reaches the maximum number of available spaces, the obligation to detain those subject to mandatory custody could mean the release of other detainees for whom the balance of risk has tipped in favor of detention. The INS should not be forced to make that choice.

Flight rates were so high in the early 1990s not as a result of chronic discretionary judgment failures by INS in assessing which aliens might pose a flight risk. Rather, the rates were alarmingly high because decisions to release aliens in proceedings were driven overwhelmingly by a lack of detention facilities. Once those facilities were augmented and INS was able to begin making risk release decisions based on relevant factors, the absconding rates declined.

Each of the amici opposes mandatory detention for legal permanent residents in removal proceedings because of the principle set forth above. By removing the flexibility needed to address these situations on a case by case basis, section 236(c) causes certain lawful permanent residents to be detained unnecessarily (or futilely in some cases) and causes the Service to expend valuable enforcement resources that could be redirected to more productive endeavors.

1. Cases That Raise Serious Issues Going to the Merits of Deportability or Relief from Removal

It serves no cognizable enforcement interest to hold aliens whose cases involve serious legal or factual issues that are likely to lead to protracted proceedings, without evaluating their risk of flight and danger to the community. The case of Arnoldo Gomez-Vela, a lawful permanent resident since 1971, is illustrative. Mr. Gomez-Vela, a citizen of Mexico, was taken into INS custody upon completion of his sentence for a 1997 "Driving Under the Influence" ("DUI") offense. The immigration judge found, and the BIA affirmed, that his

conviction constituted a "crime of violence" as defined at 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). In July 2001, the Seventh Circuit Court of Appeals terminated proceedings against him, joining the Third and Fifth Circuits in holding that a DUI offense lacked the requisite intent to use force to constitute a crime of violence. Mr. Gomez-Vela spent more than twenty-three months in county jails designed for short-term incarceration, separated from his wife and three U.S. citizen children. *Bazan-Reyes v. INS,* 256 F. 3d 600, 603-04, 612 (7th Cir. 2001).[19]

Similarly, serious legal questions concerning the availability of earlier forms of relief from removal after the 1996 legislation led to protracted litigation that was ultimately settled by this Court's ruling in *INS v. St. Cyr,* 533 U.S. 289 (2001). In the meantime, section 236(c) resulted in protracted mandatory detention for some of those who ultimately benefited from the *St. Cyr* decision.

It is reasonable to expect the INS, just like any criminal prosecutor, occasionally to test the limits of the law. The DUI litigation and *St.* Cyr are but two examples. Testing the limits, however, should not come at the expense of the legitimate liberty interests of a long-term permanent resident or his U.S. citizen children. See David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 Sup. Ct. Rev. 37, 92-109 (2002) (describing the heightened constitutional protection due to aliens who have been admitted as lawful permanent residents, owing to the legitimate roots they have established in the community). When the alien's family or economic ties to the community are such that flight is improbable and when the past criminal

---

19 *See also* Arnaldo Gomez Story, *available at* http://www.micahempowers.org/im.html

conduct is of a nature that belies future danger to that community, mandatory custody serves no legitimate law enforcement purpose.

2. Improbable Removals

When ultimate removal is unlikely because the alien's home country government has previously rejected U.S. attempts to return similarly situated individuals, mandatory detention during removal proceedings is counterproductive. For aliens who do not present a flight risk or a danger to the community, mandatory detention serves only one purpose: to drain INS resources. Even if a removal order is secured,the alien very likely will have to be released after six months. *See Zavydas v. Davis*, 533 U.S. 678 (2001). To hold such individuals throughout that period, with no individualized assessment or risk of flight or danger, serves no discernible enforcement interest and calls into question issues of fairness.

3. Not Dangerous and Unlikely to Abscond

Even for aliens with untenable challenges to removal, mandatory detention is an overbroad rule. Individuals with strong family or other ties to a community who have posted a substantial bond and convinced the Service that they pose no danger to the community, should be permitted to wrap up their affairs in the United States and prepare for removal. Denying such individuals this opportunity can create substantial hardship for the family members, sometimes U.S. citizens, left behind. Moreover, if they are found in an individualized hearing to be unlikely to abscond, it wastes limited INS resources to detain them unnecessarily.

4. Alternative Mechanisms are Available to Assure Criminal Removals

Detention remains an important element in an effective immigration enforcement system. Affirming the

decision of the Ninth Circuit would not undermine its importance. Indeed, the increased resources made available for detention and removal during the last ten years make individualized determinations of risk less dependent on the availability of detention space and more consistent with fair and efficient enforcement of the immigration laws. The regulatory provisions discussed above for a stay of a redetermination of custody by an immigration judge provide a meaningful safeguard against arbitrariness in the process. Continued emphasis on the IRP, moreover, will mean fewer aliens will reach the conclusion of their criminal custody without a resolution of their immigration status.

In addition, INS has proposed new regulations under which all aliens who are subject to a final order of removal must surrender to the INS within thirty days of such an order. *See* 67 Fed. Reg. 31157, 31161-31164 (proposed May 9, 2002) (to be codified at 8 C.F.R. pts. 3, 236, 240, and 241). Failure to surrender, under the proposed rule, subjects an alien to criminal and civil proceedings and results in the automatic denial of most forms of discretionary relief from removal. *Id.* at 31163 (to be codified at 8 C.F.R. § 241.18). Further, such failure to surrender eliminates the possibility of reopening or reconsideration of the removal order unless an alien can show that exceptional circumstances led to the failure to surrender. *Id.* at 31161 (to be codified at 8 C.F.R. § 3.2,3.23). Existing law also imposes monetary penalties of as much as $500 per day for failure to depart the United States as required by an order of removal. 8 U.S.C. § 1324d. The INS has not yet implemented this provision, but it holds significant potential for inducing released individuals to submit to removal once an order is final.

Finally, the INS should continue to explore alternatives to custody as a means of ensuring appearance at hearings and for removal. In 1996, INS asked the Vera Institute of Justice ("Vera") to establish a

supervised release program for aliens in removal proceedings in New York City. The purpose of the project, called the Appearance Assistance Program ("AAP"), was to evaluate community supervision as an alternative means of improving appearance and compliance rates without relying on detention. The test program that Vera implemented in February of 1997 ran until March 2000 and involved the supervision of more than 500 aliens. Among the most significant findings contained Vera's report is the fact that criminal aliens who were released on their own recognizance with regular supervision appeared 92% of the time.[20] This test project serves to demonstrate that effective alternatives to mandatory detention exist. Moreover, such alternatives are better tailored to balance all of the interests at stake in these situations.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

ANTHONY J. ORLER*
HOGAN & HARTSON L.L.P.
500 South Grand Avenue
Suite 1900
Los Angeles, California 90071
(213) 337-6700

* Counsel of Record

Counsel for Amici Curiae

---

20 See Christopher Stone, *Supervised Release as an Alternative to Detention in Removal Proceedings: Some Promising Results of a Demonstration Project*, 14 Geo. Immigr. L.J. 673 (2000).